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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALAN J. KARCHER, SPEAKER
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

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JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the District Court erred in rejecting, as a replacement for the New Jersey congressional redistricting statute held to contain unconstitutionally high population deviations in *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983), proposed plans which it found were "virtually identical" to the State's enacted redistricting plan, and which reduced the absolute population deviation from 3,674 people to 67 people, 42 people, and 17 people, respectively.

PARTIES BELOW

Appellant Alan J. Karcher is the Speaker of the New Jersey Assembly. Appellant Carmen A. Orechio is the President of the New Jersey Senate. Appellants James J. Florio, Robert G. Torricelli, William J. Hughes, James J. Howard, Robert A. Roe, Peter W. Rodino, Jr., Joseph G. Minish, and Bernard J. Dwyer are Democratic Members of Congress from New Jersey. Appellants were permitted to intervene as parties defendant in the proceedings in the district court.

Appellees Edwin B. Forsythe, Matthew J. Rinaldo, James A. Courter, Margaret S. Roukema, and Christopher M. Smith, Republican Members of Congress from New Jersey, and George T. Daggett, Thomas Dunn, Livio Mancino, Rev. Millard D. Birt, Rafael Fajardo, Margaret Dougherty, Maretta N. Jackson, C. Joseph Lillo, and Taxpayers Political Action Committee were plaintiffs in the proceedings in the district court.

Appellees Thomas H. Kean, Governor of the State of New Jersey, Irwin Kimmelman, Attorney General of the State of New Jersey, and Jane Burgio, Secretary of the State of New Jersey, were defendants in the district court.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES — Page

STATUTES

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OPINIONS BELOW

The opinion of the three-judge district court on remand, App. A, *infra*, is not yet reported. The District Court's previous opinion is reported *sub nom. Daggett* v. *Kimmelman*, 535 F.Supp. 978 (D.N.J. 1982). This Court's opinion is reported at —— U.S. ——, 103 S.Ct. 2653 (1983).

JURISDICTION

This case is before the Court for the second time. It involves two consolidated actions challenging the New

Jersey congressional redistricting statute, P.L. 1982, c.1, which were heard and determined by a district court of three judges pursuant to 28 U.S.C. § 2284(a). The district court declared the statute unconstitutional and enjoined its enforcement. 535 F.Supp. 978 (D.N.J. 1982). On appeal, this Court affirmed and remanded for a determination of the proper remedy. —— U.S. ——, 103 S.Ct. 2653 (1983). On February 17, 1984, the district court entered an opinion and order commanding the State defendants to conduct congressional primary and general elections under the "Forsythe, et al. Plan". App. A, B, *infra*. Appellants, who were intervenors below, filed a notice of appeal in the district court on March 2, 1984. App. C, *infra*.

This Court has jurisdiction of the appeal under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, Section 2 of the United States Constitution provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and has been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those

bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representative shall not exceed one for every thirty Thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representative shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

The New Jersey reapportionment statute, New Jersey P.L. 1982, c.1, is set forth as an appendix to the district court's original opinion, 535 F.Supp. at 985-987.

STATEMENT OF THE CASE

This is an appeal from the decision of a three-judge district court ordering into effect a plan revising New Jersey's congressional districts and commanding that it be used in all New Jersey congressional elections "until the further order of this court, or until the next decennial census, whichever is earlier." Order, App. 33a, 34a.

The most recent New Jersey statute establishing congressional districts is P.L. 1982, c.1, signed into law by the Governor in January 1982. The statute was challenged in court and in March 1982, a three-judge district court held it unconstitutional under *Kirkpatrick* v.

Preisler, 394 U.S. 526 (1969), and *White* v. *Weiser*, 412 U.S. 783 (1983), because of its absolute population deviation of 3,674 people (0.6984%). *Daggett* v. *Kimmelman*, 535 F.Supp. 978, 983 (D.N.J. 1982). Justice Brennan stayed the district court's order and the 1982 congressional elections were held under the districts established by the New Jersey statute.

Thereafter, this Court affirmed the judgment of the district court on the sole ground that the population deviations embodied in the statute were too great:

> [I]t was unnecessary for the District Court to rest its finding on the existence of alternative plans with radically different political effects. As in *Kirkpatrick*, "resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality." Starting with [P.L. 1982, c.1] itself and the census data available to the Legislature at the time it was enacted, one can reduce the maximum population deviation of the plan [from 0.6984% to 0.449%] merely by shifting a handful of municipalities from one district to another.

—— U.S., at ——, 103 S.Ct., at 2662-2663 (citations omitted). In a footnote, the Court detailed some specific shifts that would accomplish the reduction mentioned, at the same time noting that it had not "prejudge[d] the validity" of any such plan. *Id.*, at —— n.10, 103 S.Ct. at 2663 n.10.

On remand, the district court (by order of December 19, 1983, App. 31a) once again declared P.L. 1982, c.1, unconstitutional under Article I, section 2 of the Constitution, and gave the Legislature and Governor until February 3, 1984 to adopt a constitutionally valid congressional districting plan. In the event that no such plan was adopted, it ordered the parties to exchange witnesses lists by January 31 and to make their proposed witnesses

available for deposition during the period from January 31 through February 6. A hearing was scheduled for February 7, 1984.

The New Jersey Legislature acted promptly to comply with the district court's order. State Senator Lynch had introduced S. 3564, which made the changes suggested by this Court in Footnote 10 and additional modifications in order to reduce the maximum deviation from 3,764 people to 67—less than *one-fiftieth* the original deviation, and so far as appellants are aware, less than any congressional redistricting plan enacted by any legislature in the country.[1] S. 3564 was approved by both Houses of the New Jersey Legislature, but was vetoed by the Governor. Consequently, the State did not meet the district court's deadline and a hearing on remedies was held on February 7.

Eight plans were presented to the district court at the hearing.

The intervening defendants—the Democratic congressional delegation, the Speaker of the New Jersey Assembly, and the President of the New Jersey Senate—presented three plans, all variations on a single theme. Plan A was S. 3564, previously approved by both Houses of the New Jersey Legislature but vetoed by the Governor. As the district court found, it was "virtually identical" to P.L. 1982, c.1, the most recently enacted statute governing New Jersey congressional districts, except that it moved a few municipalities and reduced the overall deviation from 3,746 people to 67. App. 7a. It broke no municipal boundaries. Plan A would require only 9.9% of the State's citizens (726,513 people) to change districts and hence familiarize themselves with new candidates for the upcoming elections.

Plan B was a minor variation on Plan A. It broke a single municipal boundary, shifting one block in Kearny

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[1] The thirty-one legislatively adopted plans summarized in our brief in *Karcher* v. *Daggett* in this court had deviations ranging from tens of thousands to 95. Brief for Appellants, pp. 22-24.

from the 11th to the 10th District. By this shift, it reduced the overall deviation to 42 people. Opinion, App. 10a. Like Plan A, it shifts fewer than 10% of the state's citizens into new congressional districts.

Finally, at the hearing the State Senate intervenor sought to introduce a third plan ("Plan C"). The district court refused to admit the plan because it was not interested in further "fine tuning" to reduce the deviations in any of the submitted plans. Hearing Tr. 58-60, quotation at 60. Plan C was also based on P.L. 1982, c.1. Like Plan B, it broke a single municipality by shifting one block in Kearny. In addition, however, it moved several other municipalities, and was thus able to reduce the overall deviation to 17 people, the smallest of any plan presented to the district court before it reached its decision.[2]

The Governor presented two plans, both of which had been rejected by the Legislature. Each plan was constructed from entire municipalities. Like Plan A, the "Zimmer plan" had an overall deviation of 67 people. The other—the "Hagedorn plan"—had an overall deviation of 60 people. Opinion, App. 10a-11a. Each would place more than 30% of the state's citizens (over 2,300,000 people) in new districts and require them to familiarize themselves with new candidates in order to cast an intelligent ballot in the upcoming primary elections in June and the general elections in November.

The Republican congressional delegation (intervening plaintiffs Forsythe, *et al.*) presented one plan. Unlike all

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[2] The plan as originally presented to the District Court had a deviation of 11 people but, it was later discovered, one municipality was not contiguous. Accordingly, on February 15, 1984, counsel for the Senate intervenors wrote to Judge Fisher explaining this fact and making the technical correction necessary to restore contiguity. Plan C in its final form thus had a deviation of 17 people. It was introduced at the next Senate session as S.1329, along with a further variation (S.1340) that an overall deviation of 11 people, the lowest deviation of any plan of which appellants are aware.

the plans proposed at the previous hearing, and all plans that have passed the New Jersey Legislature or been endorsed by the Governor, the Forsythe plan split two municipalities between districts. It thus obtained an overall deviation of 25 people. Opinion, App. 11a-12a. Under the Forsythe plan, 31.7% of the State's citizens (2,335,308 people) would be placed in new districts and have to familiarize themselves with new candidates in time for the upcoming primary elections in June and the general election in November.[3]

By opinion and order dated February 17, 1984, the district court adopted the Forsythe plan, developed and proposed on behalf of the Republican congressional delegation.

The district court conceded that appellants' proposed Plan A was "virtually identical" to P.L. 1982, c.1, the last enacted statute governing New Jersey congressional districts and the statute under which New Jersey citizens have elected their present congressional delegation. Opinion, App. 7a. However, notwithstanding this Court's repeated admonition that a district court " 'should not preempt the legislative task nor "intrude upon state policy any more than necessary." ' " *Upham* v. *Seamon*, 456 U.S. 37, 41-42 (1982), *quoting White* v. *Weiser*, 412 U.S. 783, 795 (1973), *quoting Whitcomb* v. *Chavis*, 403 U.S. 124, 160 (1971)—and notwithstanding the square holding in *Upham* that a district court errs "when, in choosing between two possible court-ordered plans, it fail[s] to choose that plan which most closely approximate[s] the

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[3] In addition, intervening plaintiff the Taxpayers Political Action Committee submitted two plans at the hearing, both prepared by one C.A. Haverly, an expert in applied mathematics and computer science. The first of these plans (Haverly I) would produce an overall deviation of 1.82%, or about 9,574 people. The second of these plans (Haverly II) was similar, but reduced the deviation to 0.85%, about 4,471 people—slightly more than the deviation found unconstitutional when embodied in P.L. 1982, c.1, at the prior stage of this case. Opinion, App. 6a-7a.

state-proposed plan," 456 U.S., at 42—the district court concluded that it need not defer in any way to P.L. 1982, c.1, and need not in any way attempt to approximate the districts that it created. This the court concluded because P.L. 1982 c.1, had previously been declared unconstitutional, and "[w]e owe no deference to an unconstitutional statute." Opinion, App. 9a.

The district court thus concluded that, with no deference due to the New Jersey statute, it was free to choose among plans in accordance with its own views of what was the best districting policy to be adopted. Opinion, App. 7a-8a. It concluded that the differences in deviation between appellants' Plans A and B, and the Hagedorn and Zimmer plans (67 for Plan A and the Zimmer plan, 60 for the Hagedorn plan, and 42 for Plan B) were "so slight as to be irrelevant." Opinion, App. 11a.[4] It found the Hagedorn and Zimmer plans preferable because they were "considerably more compact" than Plan A. *Id.*

However, the district court concluded that the Forsythe plan was preferable to all of these. It found its slightly lower population deviation (25 people, as opposed to 67, 60, or 42 in the other plans discussed) to be a "great advantage." Opinion, App. 12a.[5] It also found that the Forsythe plan "goes much further than the Hagedorn or Zimmer plans in achieving compact districts." *Id.* The Court did not explain what, if any, test it used to measure compactness. The district court conceded that—unlike the New Jersey statute, unlike the plan approved by the current New Jersey Legislature, and unlike every plan en-

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[4] The court rejected the two Haverly plans because of their large population deviations. Opinion, App. 6a-7a.

[5] The district court did not explain why the difference of 18 people between the Hagedorn plan and Plan B was "irrelevant," but the difference of 17 between the Forsythe plan and Plan B represented a "great improvement."

dorsed by the Governor of the State—the Forsythe plan splits two municipalities. However, it concluded that this "disadvantage" was "outweighed by the advantages of compactness and population near uniformity." Opinion, App. 12a.[6] Accordingly, it ordered the Forsythe plan into effect "until the further order of this court, or until the next decennial census, whichever is earlier." Order, App. 34a.[7]

THE QUESTION IS SUBSTANTIAL

In its original opinion in this case, the district court struck down the New Jersey redistricting statute solely because it failed adequately to comply with Article I, § 2's requirement of district population equality. *Daggett* v. *Kimmelman*, 535 F.Supp. 978 (D.N.J. 1982). This Court affirmed that judgment on the sole ground that the inequalities in size among districts were too great to stand without justification, and that no adequate justification

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In addition, of course, the district court did not discuss the plan presented by the Senate intervenors, which had an absolute deviation of 17 people, even lower than that in the Forsythe plan adopted by the court. It had excluded that plan from evidence, on the ground that it came too late and the court was not interested in further reductions of any of the existing plans. See p. 6 *supra*.

[6] The district court did not explain how it reached this balance of the respective interests. It was not presented with, nor did it seek, any information regarding the administrative difficulties with regard, for example, to the location of polling places, ballot makeup, or the registration of voters if voters within a single New Jersey municipality were divided into two different congressional districts.

[7] The order appears to bar the New Jersey Legislature and Governor—the legitimate lawmaking organs of the State—from enacting and enforcing a new congressional districting plan without specific judicial permission. Such unprecedentedly broad relief was never sought by any part and never discussed in briefs or argument below.

Appellants pointed out this problem to the district court in their application for a stay of the court's order, filed March 7, 1984. At the time of printing—March 14—the order has not been modified.

for the inequalities had been shown. *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983). On remand, the district court once again declared the New Jersey redistricting statute unconstitutional on the *sole* ground that it violated Article I, § 2. Order, December 19, 1983, App. 31a.

Appellants then presented the district court with plans which were "virtually identical" with the State's own redistricting plan, making only the changes necessary to reduce the population deviation from 3,674 to 67 (or 42, or 17) people. The district court rejected those plans. It chose, instead, a radically different plan more in accord with the district court's taste in district configurations. The district court's plan will shift almost one-third of the State's population—over two and one-third million people—into new districts, requiring them to familiarize themselves with new candidates in order to cast an intelligent ballot in the upcoming primary and general elections. This is clear error:

> The only limits on judicial deference to state apportionment policy [are] the substantive constitutional and statutory standards to which such state plans are subject.

Upham v. *Seamon*, 456 U.S. 37, 42 (1982).

> Despite the existence of Plan B, the District Court ordered implementation of Plan C, which, as conceded by all parties, ignored legislative districting policy and constructed districts solely on the basis of population considerations. The District Court erred in this choice. Given the alternatives, the Court should not have imposed Plan C, with its very different political impact, on the State. *It should have implemented Plan B, which most clearly approximated the reapportionment plan of the state legislature while satisfying constitutional requirements . . . . [E]ven if the districts in Plan C can be called more compact, the District Court's preferences*

> *do not override whatever state goals were embodied in S.B. 1 and, derivatively, in Plan B.*

White v. *Weiser*, 412 U.S. 783, 796 (1973) (emphasis added).

Appellants seek summary reversal of this judgment so that the upcoming primary and general elections may take place under a districting scheme as close as possible to the one chosen by the elected representatives of the people of the State.[8] Should this Court take action before the middle of April, this process can go forth without delay. In the alternative, if this Court should conclude that full briefing and oral argument are necessary, appellants are concurrently with this Jurisdictional Statement filing an application for stay with the Circuit Justice, requesting an order that the upcoming elections be held under appellants' Plan A. Such an order would not require the State to devise means to hold elections where voters in the same municipality are assigned to different congressional districts.

I. THE DISTRICT COURT'S ORDER IS DIRECTLY CONTRARY TO *SIMON* v. *DAVIS*, —— U.S. ——, 103 S.CT. 3564 (JULY 6, 1983); *UPHAM* v. *SEAMON*, 456 U.S. 37 (1982), AND *WHITE* v. *WEISER*, 412 U.S. 783 (1973).

The district court gave two justifications for its choice of the Forsythe plan over the plans modeled on the state statute. Both of those justifications have been squarely rejected in decisions of this Court.

A. The population deviations are too small to disregard the State's plan.

The district court found it a "great advantage" that the Forsythe plan had an overall deviation of 25 people

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[8] The filing deadline for primary elections this year is April 26. N.J.S.A. §§ 19:23-8, 19:23-14. The primaries will be held on June 6. N.J.S.A. § 19:23-40.

(in districts containing 526,072), while appellants' Plan A had a deviation of 67 people, and Plan B a deviation of 42. Opinion, App. 12a.[9] This Court has already noted, in this case, that a plan is not invalid "whenever a court can conceive of minor improvements," *Karcher* v. *Daggett*, —— U.S. at ——, 103 S.Ct. at 2663 n.10 (1983), and it is hard to conceive of improvements more minor than this. All of the plans have deviations below 0.02%. Indeed, the district court rejected an additional plan with even lower deviations because it was uninterested in further "fine tuning" of the plans. Transcript of Hearing, p. 60. In any event, however, in *Simon* v. *Davis*, —— U.S. ——, 103 S.Ct. 3564 (1983), this Court squarely held that deviations far larger than this are not of constitutional significance.

Simon v. *Davis* involved the congressional redistricting of Pennsylvania. The state law under review involved an overall deviation of 1,215 people (0.2354%), while competing rejected plans had deviations less than half that size. The District Court found that "partisan considerations played a vital role" in the determination of the final plan, and noted that it could well have designed "districts that were more compact and contiguous." *In re Pennsylvania Congressional Districts Reapportionment Cases*, 567 F. Supp. 1507, 1509, 1510, 1517 (M.D. Pa. 1982). The only justification argued or found by the District Court for the population deviation was that political considerations had to be taken into account in order to get a bill past the partisan legislature. *Id.* The district court nevertheless upheld the statute and this Court affirmed.

The Jurisdictional Statement in *Simon* squarely presented the question whether the degree of deviation in the statute rendered it unconstitutional in light of the availability of other plans with one-third the amount of devia-

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[9] The district court refused to consider a plan, submitted by the Senate appellants at and after the hearing on February 7, which would have reduced the deviation to 17. See p. 6, *supra*.

tion, or at least required some additional showing of justification. This Court answered the question in the negative when it summarily affirmed the District Court's judgment. *Simon* v. *Davis*, —— U.S. ——, 103 S.Ct. 3564 (1983).[10] Unless *Simon* v. *Davis* is to be abandoned before its first birthday, the district court was in error in concluding that the difference of 42 people (out of more than 7 million) between the deviations in Plan A and the Forsythe plan—or the difference of 17 people between Plan B and the Forsythe plan—could possibly outweigh the radical departure the Forsythe plan would make from the State's own, duly enacted congressional redistricting statute.[11]

B. Compactness does not justify rejecting the State's plan.

The district court also found it a "great advantage" that the Forsythe plan created "more compact districts" than the alternatives. But this Court has repeatedly held that compactness of districts is a question for legislative and not judicial judgment. *E.g.*, *Simon* v. *Davis*, —— U.S. ——, 103 S.Ct. 3564 (1983); *Gaffney* v. *Cummings*, 412 U.S. 735, 752 n.13 (1973). In *White* v. *Weiser*, 412 U.S. 783, 796 (1973), this Court squarely held that district judges' "preferences" for more compact districts do not "overide whatever state goals were embodied in" in a state redistricting statute and authorize the district court to adopt a plan less like the statute than competing plans.

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[10] This Court subsequently denied a petition for rehearing that alleged the ruling was inconsistent with *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983). 52 U.S.L.W. 3187 (Sept. 9, 1983). The court below did not mention *Simon* (which was briefed at some length) in its opinion.

[11] If deviations of this size are of remedial significance, the district court should have adopted the plan proposed by the Senate intervenors, which adhered closely to the New Jersey statute and reduced the deviation to 17 people, less than the deviation in the Forsythe plan, and which is far less disruptive than the Forsythe plan would be.

This is precisely what the district court did here, and its action warrants summary reversal.

II. NO ALTERNATIVE GROUNDS CAN SUPPORT THE DISTRICT COURT'S JUDGMENT.

The district court's judgment cannot be supported on any alternative grounds. That court at one point in its opinion appears to read this Court's prior opinion in the case, *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983), as having *held* that the New Jersey statute, P.L. 1982, c.1, was an unconstitutional gerrymander. Opinion App. 9a. If this was its conclusion, the district court was patently in error. And although the district court repeatedly so characterized the statute, *e.g.*, App. 8a, 9a, 10a, nowhere in the opinion is there the slightest hint of any standard used by the court to support such a characterization—or any factual findings relevant to the question. *Cf.* Fed. R. Civ. P. 52(a). Indeed, on the present record any such findings would have to be upset as clearly erroneous.

A. This Court's prior opinion spoke only to the population deviations.

Responding to appellants' introduction of evidence relevant to the political fairness of the competing plans, the district court stated:

> the present effort to justify [P.L. 1982, c.1] as nonpartisan is a thinly veiled effort to relitigate the liability stage of this lawsuit after an affirmance by the Supreme Court of the holding that [P.L. 1982, c.1] is unconstitutional. We have grave doubt whether, consistent with the Supreme Court's judgment, this court is free to permit such relitigation.

Opinion, App. 9a. To the extent that district court read this Court's prior opinion as having held that P.L. 1982, c.1, was an unconstitutional gerrymander and thus could be ignored notwithstanding *White* v. *Weiser* and *Upham* v. *Seamon*, it is blatantly in error. *Karcher* held two

things. First, it held that the statute, with its deviation of 3,674 people, "did not come as nearly as practicable to population equality," and therefore was constitutional only if adequately justified. 103 S.Ct. at 2658-2663 (quotation at 2653). Second, it upheld the district court's prior finding that there was not "any causal relationship" between the asserted justification of protecting minority voting strength and the deviations embodied in the statute. *Id.* at 2663-2665 (quotation at 2665). Even the Justices who spoke to the gerrymandering question—Justice Stevens, concurring, and Justice Powell, in dissent—limited their discussion to the general question of standards and explicitly refrained from determining whether the statute represented a gerrymander. 103 S.Ct. at 2667 (Stevens, J., concurring), 2690 (Powell, J., dissenting).

B. The District Court's opinion cannot be read as a finding of unconstitutionality based on compactness or gerrymander.

1. *It sets no standards.*

Except insofar as it erroneously reads this Court's prior opinion in *Karcher* as holding P.L. 1982, c.1 (and hence, the derivative plans presented below by appellants) as an unconstitutional gerrymander, the district court's opinion cannot plausibly be read as embodying an independent judgment on that question. If it does embody such a judgment, it cannot stand.

Most important, except for occasional epithets, there is *no* mention or discussion of *any* standard applied by the district court to determine whether P.L. 1982, c.1 (or any other plan) represented an unconstitutional gerrymander. It is impossible to imagine that three federal judges, dealing with a question as difficult and delicate as that of gerrymandering, would reach a judgment without even hinting at the standards they were applying to reach it.

For gerrymandering, as this Court well knows, is neither a simple question nor an obvious one. No human

legislature could pass a districting bill without some thought to its political impact. Thus this Court last Term, in *Simon* v. *Davis*, —— U.S. —— 103 S.Ct. 3564 (1983), squarely held that a redistricting plan was not unconstitutional when, as found by the District Court, "political considerations" played a part in the legislature's choice of that plan over other plans that were considerably more compact and embodied substantially smaller population deviations.[12] "The reality is that districting inevitably has *and is intended to have* substantial political consequences." *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973) (emphasis supplied). This Court in *Gaffney* decried as "politically mindless" the suggestion that "those who redistrict and reapportion should work with census, not political data and achieve population equality without regard for political impact." *Id.* Thus, the standard for unconstitutional gerrymandering must be something more than whether the proponents of a particular bill hoped to obtain some political objection from its passage. If the district court applied any standard whatsoever, its conclusion as to the standard applied is wholly hidden from view.[13]

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[12] Based on the census data available to the legislature at the time, the bill under review in *Simon* had an overall deviation of 1215 persons; other bills before the Legislature had deviations less less than one-quarter that size. "[P]artisan considerations played a vital role in the proposed districting plan. Some were drawn to give a particular party a hoped for advantage in the forthcoming election, or to match two incumbents from the same party against each other." More compact districts could have been designed. Nevertheless, the statute was upheld, and this Court affirmed over a direct claim of unconstitutional gerrymandering in the Jurisdictional Statement. *In re Pennsylvania Congressional District Reapportionment Cases*, 567 F.Supp. 1507, 1509, 1510, 1517 (M.D. Pa. 1982), *affirmed per curiam* sub nom. *Simon* v. *Davis*, —— U.S. ——, 103 S.Ct. 3564 (1983).

[13] If the district court's opinion is read as making an independent finding of gerrymandering, it is in clear violation of Fed. R. Civ. P. 52(a), which, in order to facilitate appellate review, requires the

2. *If the District Court found a gerrymander, the record does not support it.*

Despite more than two years of litigation and frequent repetition of the epithet "gerrymander," plaintiffs have not yet brought forth a single scrap of evidence designed to show that P.L. 1982, c.1, and hence the derivative plans urged by appellants, discriminate against *any* political group. At least some evidence of this kind is absolutely essential if resolution of gerrymandering claims is to be anything more than a debate over esthetics by parties—and judges—whose views on modern art are no part of the Constitution of the United States. For "attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts," *Gaffney* v. *Cummings*, 412 U.S. 735, 752 n.13 (1973), or congressional districts either.

In these matters, appearance can be misleading—or unavoidable. For example, Justice Stevens in concurrence criticized the Fifth District because it stretched "from the New York suburbs to the rural upper reaches of the Delaware River," and also because it "contains segments of at least seven countries." 103 S.Ct., at 2676. Yet the Fifth District ordered by the district court *also* stretches from the New York suburbs to the upper reaches of the Delaware.[14] And although the district court's Fifth District is somewhat more compact, this is achieved by turning the Twelfth District into a bloated, five-fingered hand, that, like the old Fifth, "contains segments of at least seven counties." See App. 26a-27a. The point is simple: although oddly-shaped districts may be *relevant* to the question of gerrymandering, they cannot be the ending point of the inquiry. For alleged gerrymandering to be judi-

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court to "find the facts specially and state separately its conclusions of law thereon." See *Withrow* v. *Larkin*, 421 U.S. 35, 44-46 (1975).

[14] The district court's district comes closer to New York by running farther down the Hudson River, and does not extend as far down the Delaware.

cially cognizable, before a state statute is held unconstitutional on that ground there must be *some* plausible showing that "an identifiable political group" has had its voting strength "diluted," 103 S.Ct., at 2672 (Stevens, J., concurring), or that the plan "invidiously discriminated against a racial or political group," *id.*, at 2687 (White, J., joined by Burger, C.J., Powell, and Rehnquist, JJ., dissenting), or that the plan has the "effect of substantially disenfranchising identifiable groups of voters," *id.*, at 2689 (Powell, Jr., dissenting). Plaintiffs have had more than two years to make such a showing. They have not even attempted to do so.

Nor could they do so. For P.L. 1982, c.1, and hence the derivative plans relied on by appellants, do not unconstitutionally dilute the votes by Republicans or anyone else.

First, any such claim is belied by the results of the 1982 congressional elections. In those elections, fourteen incumbents ran against fourteen challengers. Thirteen incumbents won. The sole incumbent who lost his seat was Representative Hollenbeck, a Republican. However, his loss can hardly be ascribed to a "gerrymandered" district. He lost "many municipalities . . . that he had represented in his old district and had carried in previous elections, and by margins comparable to those by which he lost in the new part of the district." Affidavit of Thomas E. Mann, App. 40a.

Second, the plan proposed by appellants (and hence P.L. 1982, c.1, from which it is derived) is politically fair under standard tests used by political scientists. Appellants presented an affidavit of Dr. Thomas Mann, Executive Director of the American Political Science Association. Appendix D.[15] Dr. Mann examined voting patterns in the 1978, 1980, and 1982 congressional elections; the 1981 and 1983 state Senate elections; the 1981 and 1983

[15] Plaintiffs were offered the opportunity to depose Mr. Mann but declined.

state Assembly elections; the 1980 presidential election; the 1981 gubernatorial election; and and the 1982 United States Senate election. "Using the test of fairness devised by Backstrom, *et al.* (*Minnesota Law Review*, vol. 62 (1978), 1121-1159), that the majority party, when it has received a bare majority of the statewide vote, be in a majority in a bare majority of the districts, I conclude that [appellants' Plan A] is fair." Mann Affidavit, ¶ 10, App. 38a (referring to test under congressional and state Senate and Assembly elections). "[T]he district results under [appellants' Plan A] fairly reflect the statewide results, and neither party is prevented from winning a majority of districts when it achieves a statewide majority of votes." Mann Affidavit, ¶ 10, App. 39a (referring to test under presidential, gubernatorial, and U.S. Senate elections).[16]

In two years of opportunity and three hearings in two courts, plaintiffs have consistently argued that P.L. 1982, c.1, and appellants' proposed derivative plans, represent an unconstitutional gerrymander. In two years of opportunity and three hearings in two courts they have not presented a shred of evidence to show that P.L. 1982, c.1, or any of appellants' proposed plans, discriminates in any way against any group. The district court referred to no such evidence. There is none. If this Court should conclude that the district court's opinion represents a finding that P.L. 1982, c.1, and its derivative plans, are an unconstitutional gerrymander, summary reversal is warranted on that ground as well.

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[16] The district court expressed some doubt that it was even free to consider Dr. Mann's evidence. It dismissed the statements regarding presidential, U.S. senatorial, and gubernatorial elections as not "of any real relevance" to congressional elections. It did not mention Dr. Mann's conclusions based on the congressional elections. Opinion, App. 9a-10a.

Dr. Mann was the *only* expert whose evidence was presented by *any* party on the question of gerrymandering. The election data appears in Appendix E, *infra*.

III. THE DISTRICT COURT'S ORDER IS TOO BROAD.

The district court ordered

> that primary elections and elections for members of the House of Representatives shall be conducted, in New Jersey, until the further order of this court, or until the next decennial census, whichever is earlier, from the single member districts set forth in the Opinion filed herewith.

Order, App. 34a.

The order is too broad. It denies the Governor and Legislature of the State of New Jersey the power, without judicial permission, to enact a new redistricting statute and carry it into effect should they choose to do so. There is no question that the district court has the power to order a plan into effect, given that P.L. 1982, c.1, has been declared unconstitutional and the State has not in the interim enacted a different plan. However, should the State do so in the future there is no warrant for ordering it to return to court before any such plan is put into effect. A new statute would be *res nova*, and come before the district court—if challenged at all—with the usual presumption of constitutionality afforded to statutes. The State should not be required to obtain judicial permission *in advance* of the enforcement of a new statute.

CONCLUSION

The New Jersey redistricting statute, P.L. 1982, c.1, was declared unconstitutional because of and solely because of the size of the population deviations embodied in that plan. There is literally *no* evidence before the district court that P.L. 1982, c.1, or any of the derivative plans relied upon by appellants, discriminates against any identifiable political or racial group. The district court referred to no such evidence. Uncontroverted evidence, establishes that these plans are politically "fair" by analysis of ten different elections, local and statewide. Appel-

lants presented the district court with plans that were "virtually identical" to P.L. 1982, c.1, and reduced the population deviation from 3,764 to 67, 42, and 17 people.

Nevertheless, the district court adopted a plan, submitted on behalf of the Republican congressional delegation, that violates longstanding state policy by breaking municipal boundaries, deviates grossly from P.L. 1982, c.1, and which will require almost a third of the state's citizens to familiarize themselves with new candidates in the upcoming elections. It did so because of its preference for the shapes embodied in its preferred plan. This judgment warrants summary reversal and a remand to the district court with directions to order implementation of one of the plans proposed by appellants.

Respectfully submitted,

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March 15, 1984

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 82-297

GEORGE T. DAGGETT,
Plaintiff

v.

IRWIN I. KIMMELMAN, ETC., *et al.*,
Defendants

and

Civil Action No. 82-388

EDWIN B. FORSYTHE, *et al.*,
Plaintiffs,

v.

THOMAS H. KEAN, ETC., *et al.*,
Defendants

JAMES J. FLORIO, *et al.*,
Intervenors.

[Filed Feb. 17, 1984]

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Before:

GIBBONS, Circuit Judge
FISHER, Chief District Judge
BROTMAN, District Judge.

GIBBONS, *Circuit Judge*:

These consolidated cases are before us on remand from the Supreme Court, which on June 22, 1983 affirmed this Court's holding that P.L. 1982, c.1 (codified at N.J. Stat. Ann. § 19:46-5 (West Supp. 1983-84) (hereinafter Feldman Plan), creating districts for the election of members of the House of Representatives from New Jersey, is un-

constitutional, and enjoining the defendant state officers from conducting primary or general congressional elections under its terms.[1] This court's prior order fixed March 22, 1982 as the date for enactment by New Jersey of a new constitutional congressional redistricting plan, and provided that if no such plan was enacted by that date the court would convene to undertake further proceedings. Because the Supreme Court, on March 15, 1982, issued a stay of this court's injunction,[2] the 1982 congressional election took place under the Feldman Plan. The Supreme Court's affirmance of this court's order, however, restored the injunction. On December 19, 1983, this court fixed February 3, 1984 as the date by which New Jersey could enact a constitutional congressional redistricting plan, and February 7, 1984 as the date of a hearing on further proceedings if no such plan was enacted.

On January 5, 1984 the New Jersey Legislature adopted Senate Bill 3564, but that bill was vetoed by Governor Thomas H. Kean, and had insufficient support for reenactment over his veto. Since no legislation was adopted in the time permitted by this court's December 19, 1983 order, we convened on February 7, 1984 and held a hearing on further relief.

At that hearing six separate redistricting proposals were advanced by various parties. No party urged that the next New Jersey congressional election be held on an at-large basis without districts. Instead, the parties unanimously urged that the court select the plan, among those admitted in evidence, which satisfied the constitutional standards for congressional districts, while most nearly satisfying non-constitutional criteria for fair dis-

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[1] Karcher v. Daggett, —— U.S. ——, 103 S. Ct. 2653 (1983), *aff'g* Daggett v. Kimmelman, 535 F. Supp. 978 (D.N.J. 1982).

[2] Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers).

tricting. Thus the parties urged that the court should adopt a remedy similar to that adopted, following the 1970 decennial census, in *David v. Cahill*, 342 F. Supp. 463 (D.N.J. 1972). We note in passing that although the decree in *David v. Cahill* did not so require, the redistricting plan which it adopted was utilized for New Jersey congressional elections until the 1980 decennial census rendered it obsolete.

The population of New Jersey in the 1980 decennial census, as most recently corrected by the Bureau of Census, is 7,365,011. New Jersey is entitled to representation in the House of Representatives by fourteen representatives; one less than under the 1970 decennial census. Thus the ideal congressional district would have a population of 526,072.

Article I, § 2, as interpreted by the Supreme Court, permits only such limited population variances from the standard of equal district population as "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Karcher v. Daggett*, —— U.S. at ——, 103 S. Ct. at 2658 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). Moreover, a good-faith effort to achieve absolute equality is not established by producing a redistricting plan with a maximum population deviation "smaller than the predictable undercount in available census data." *Karcher v. Daggett*, —— U.S. at ——, 103 S. Ct. at 2658, 2662. Compare *Daggett v. Kimmelman*, 535 F. Supp. at 983, 985 (Gibbons, J., dissenting). Moreover, once it has been established that a redistricting plan "was not the product of a good-faith effort to achieve population equality," the burden shifts "to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective." *Karcher v. Daggett*, —— U.S. at ——, 103 S. Ct. at 2663. Among the policies which may justify some variance are "making districts compact, respecting municipal boundaries, preserving the cores of

prior districts, and avoiding contests between incumbent Representatives." *Id.* In the prior decision of this court we found that the State had failed to carry its burden of justification with respect to the Feldman Plan, and the Supreme Court affirmed that finding as not clearly erroneous. *Id.* at ——, 103 S.Ct. at 2665. Finally, the opinion of the court in *Karcher v. Daggett*, while declining to rely, as a constitutional violation, on the obviously partisan purposes behind the Feldman Plan, recognizes that "[a] federal principle of population equality does not prevent any State from taking steps to *inhibit* gerrymandering, so long as a good-faith effort is made to achieve population equality as well." *Id.* at —— n.6, 103 S.Ct. at 2660 n.6 (emphasis supplied).

While *Karcher v. Daggett* considers what interests may be taken into account by state legislatures in justifying deviations from the ideal of district population equality based on the decennial census, it also provides useful instruction to district courts faced, as we are, with selecting a districting plan because of a failure in the legislative process. We may take into account at least those factors which the Court has recognized as legitimate, namely: making districts compact, preserving municipal boundaries, preserving cores of prior districts, avoiding contests between incumbents, and inhibiting gerrymandering. With those factors in mind we turn to the several plans which have been proposed.

A. The Haverly Plan

Taxpayers Political Action Committee, an intervenor, proposed Exhibit IM-1(a), a plan, and exhibit IM-1(b), a district map, produced at its request by C.A. Haverly, an expert in applied mathmatics and computer science. Haverly's plan, according to his report, was designed with the objective of keeping the maximum population deviation of any district at less than +/—1%, preserving municipal boundaries, maximizing compactness and contigu-

ity, avoiding county fragmentation, and preserving population stability from old to new districts. The Haverly plan, while reasonably attractive in other respects, proposes a population variation between the largest and smallest districts of 1.82%. An alternative version proposes a population variation of .85%. This variation between the largest and smallest districts is larger than any which would occur in the plans proposed by other parties. Since we must make a good-faith effort to maximize population equality, we decline to adopt Exhibit IM-1(a) as a remedy.

B. Senate Bill 3564

The Democratic congressmen, intervenors, urge that the court adopt as a remedy the plan embodied in Senate Bill 3564 which passed the New Jersey Legislature, but was vetoed by Governor Kean. That plan, Exhibit IF-2(c), is reflected in the map, Exhibit D-6. A comparison of Exhibit D-6 with the map of the New Jersey congressional districts resulting from the Feldman Plan reveals that the districts are virtually identical. Some slight changes have been made, by moving municipalities among districts, so as to achieve a low district population of 526,020, and a high of 526,087, or a maximum variation of 67 persons and an absolute mean deviation of 11.50 persons. This plan produces a relative overall range of .01273%, and a relative mean deviation of .00218%.

We need not consider how Exhibit IF-2(c) would have fared had it been validly enacted by the State of New Jersey. *Compare Karcher v. Daggett*, —— U.S. ——, 103 S.Ct. at 2667-78 (Stevens, J., concurring) *with id.* —— U.S. at ——, 103 S.Ct. at 2687-90 (Powell, J., dissenting). Senate Bill 3564 is proposed to us as a remedy. As such it does not meet the criteria which we consider relevant to the exercise of our discussion in devising a remedy. First, it does not achieve as small an overall or mean deviation as other plans which are in evidence. While it does succeed in preserving municipal boundaries,

the population variances it would maintain are not maintained for that purpose, but rather for the purpose of preserving, as nearly as possible, the districts erected in the Feldman Plan. While Exhibit IF-2(c) preserves the cores of the districts established in the Feldman Plan, those districts are unconstitutional. The plan in Exhibit IF-2(c) has little if any relationship to the cores of districts established under *David v. Cahill*, and even less relationship to the cores of the last valid New Jersey congressional reapportionment enactment. Exhibit IF-2(c) avoids contests between incumbents. These contests are avoided, however, only because some incumbents moved in 1982 or ran outside their home district, thereby managing to win elections from unconstitutional districts. The most glaring defects in the Feldman Plan, however, are carried forward in Exhibit IF-2(c). These are an obvious absence of compactness, and an intentional gerrymander in favor of certain Democratic representatives.

The Democratic congressmen intervenors urge that we must, as a matter of law, adopt Exhibit IF-2(c) as a remedy. Their legal position in this regard is predicated on certain language in *White v. Weiser*, 412 U.S. 783 (1973), which is said to require that result. In that case the Supreme Court held that a district court should, in choosing among remedial plans, choose the plan which most closely approximates that selected by a state legislature. *Id.* at 795. The policy dispute in *White v. Weiser* among the competing plans was over the district court's rejection of a state policy of avoiding contests among incumbents. The Feldman Plan did not implement such a policy; quite the opposite. It was designed to produce contests among certain Republican incumbents. Moreover, *White v. Weiser* teaches that "the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge." 412 U.S. at 797. The State policy embodied in the Feldman Plan was to deviate from the norm of population equality for the

patently discernable purpose of partisan advantage. That policy was not merely vulnerable to legal challenge; the challenge succeeded. We owe no deference to an unconstitutional state statute.

The proponents of the plan in Exhibit IF-2(c) urge that in fact the Feldman Plan was not a partisan gerrymander, but only a neutral effort by the legislature and the former Governor to provide for congressional representation roughly equivalent to the voting strength of the Democratic and Republican parties in the state. In support of that contention, they have produced computer generated analyses of the results, in each of the districts proposed in Exhibit IF-2(c), of several statewide elections. The inference they would have us draw from these analyses is that the districts established by the Feldman Plan were in fact non-partisan.

For several reasons we decline the invitation to endorse as a remedy the basic districts set forth in the Feldman Plan. First, the present effort to justify those districts as non-partisan is a thinly veiled effort to relitigate the liability stage of this lawsuit after an affirmance by the Supreme Court of the holding that the Feldman Plan is unconstitutional. We have grave doubt whether, consistent with the Supreme Court's judgment, this court is free to permit such relitigation. Assuming we were free to consider the evidence of hypothetical results, in each district, of elections other than those for Congress, we would not find that evidence of any real relevance. While it is true that congressional elections are frequently affected by the same issues that influence the outcome of Presidential and Senatorial contests, the patent reality is that they are strongly influenced by the more direct relationship of a Representative with the voters in his own district. Thus the fact that a district may have voted in favor of a senatorial or presidential candidate of one party is hardly a strong predictor of the outcome of a congressional race. The case of a gubernatorial election,

which may turn on statewide rather than national or district issues, is even less relevant.

A final contention advanced in favor of Exhibit IF-2(c) is that in the election held under the Feldman Plan all Republican incumbents save one survived the election. With the benefit of such hindsight we are asked to adhere as closely as possible to the districts established in the 1982 legislation. The Supreme Court, however, had the benefit of the same hindsight when, on June 22, 1983, it decided *Karcher v. Daggett*. The Court undoubtedly was as aware as we are of the unique set of circumstances surrounding that election, such as Representative Fenwick's race for the Senate, which permitted Congressman Courter to run unopposed in the district to which he moved, and Congressman Rinaldo's decision to run outside his home district, which produced results unexpected by those responsible for enacting the Feldman Plan. That statute's unconstitutionality cannot be disregarded merely because its intended partisan results were not fully realized.

Thus we conclude that Exhibit IF-2(c), embodying the provisions of Senate Bill 3564, is not an appropriate remedy for the unconstitutionality of the Feldman Plan. For the same reasons, we conclude that a modification of that plan, which would shift one census block from the proposed eleventh to the proposed tenth district, thereby reducing the variation from 67 to 42 persons, is also an inappropriate remedy.

C. The Hagedorn and Zimmer Plans

The executive branch defendants propose for our consideration two redistricting plans which were introduced, but not enacted, in the New Jersey legislature. The first, introduced by Senator Hagedorn as Senate Bill 1111, is reflected in the district map Exhibit D.7. The second, introduced by Assemblyman Zimmer, as Assembly Bill 839, is reflected in the district map Exhibit D.9. The

Hagedorn map produces a high population district of 526,115 and a low population district of 526,055, or a maximum variation of 60 persons, and an absolute mean deviation of 11.50 persons. The relative overall range is .01140% and the relative mean deviation is .00218%. The Zimmer map produces a district with a high population of 526,087 and a district with a low population of 526,020, or a maximum variation of 67 persons, and an absolute mean deviation of 10.92 persons. The Zimmer plan's relative overall range is .01273% and its relative mean deviation is .00207%. A comparison of these deviation figures with those that would result from the adoption of Senate Bill 3564 shows that the numerical differences are so slight as to be irrelevant.

Since neither the Hagedorn nor the Zimmer plans were enacted, the executive branch defendants do not suggest that they come clothed with any mantle of state policy. The districts reflected in Exhibits D.7 and D.9 are considerably more compact than those in the Feldman Plan, and thus also more compact than those in Senate Bill 3564. Neither splits municipal boundaries, and neither places incumbent representatives in the same district. If the choice were between Senate Bill 3564 and either the Hagedorn or the Zimmer plan, either of the latter two would in our view embody preferable remedial features. And, as between Hagedorn and Zimmer, the slightly lower absolute mean deviation in the Zimmer plan, 10.92 persons, probably would tip the scale in its favor. The Zimmer plan must, however, be compared with one remaining proposal.

D. The Forsythe, et al. Plan

The original plaintiffs in one of these consolidated cases, No. 82-388, were Republican candidates in the 1982 primary congressional elections. All but one of them [3] have

[3] We are advised that Congressman Courter, a plaintiff in No. 82-388, has terminated the authority of the firm of Hellring, Linde-

proposed a redistricting plan. That plan is embodied in Exhibit P-1(a) and (b), and the map depicting the proposed districts is Exhibit P-1(c). The plan shown on Exhibit P-1(c) produces a high population district of 526,087 and a low population district of 526,062, or a maximum variation of only 25 persons, and an absolute mean deviation of 5.9 persons. The relative overall range is .00475% and the relative mean deviation is .00112%. Thus the plan reflected in Exhibit P-1(c) achieves the lowest population deviation of any plan which has been presented. Moreover it goes much further than the Hagedorn or Zimmer plans in achieving compact districts. Like all the plans considered, it avoids placing incumbents in the same district. Unlike any of the others, however, it achieves the extremely low population deviation in part by splitting off certain census tracts from the Essex County municipality of Belleville, and the Hudson County community of Kearny. The plan, in what it proposes as the 10th Congressional District, preserves a congressional district in which a majority of the population is black. No evidence has been offered from which we could find that it is designed to achieve partisan advantage.

The two great advantages of the Exhibit P-1(c) plan, over any of the others, are the achievement of smaller population deviations, and the creation of more compact districts. The only disadvantages which the plan presents is the splitting of two North Jersey municipalities in order to achieve those advantages. We hold that this disadvantage is outweighed by the advantages of compactness and population near uniformity. Thus, among those in evidence, the plan which in our view most nearly fits the appropriate criteria for a court considering a congressional reapportionment plan as a remedy for an unconstitutional reapportionment statute, is that set forth in Exhibits P-1(a) (b) and (c).

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man, Goldstein & Siegal to act on his behalf, and that he disapproves of the submission of the plan in question.

It will therefore be ordered, adjudged and decreed that primary elections and elections for members of the House of Representatives shall be conducted, in New Jersey, until the further order of this court, or until the next decennial census, whichever is later,* from the following single member districts:

* [By order of the district court dated Mar. 5, 1984, this language was changed to "whichever is earlier."]

1ST CONGRESSIONAL DISTRICT

Burlington County	
Maple Shade Township	20,525
Palmyra Borough	7,085
Riverton Borough	3,068
Camden County	
Audubon Park Borough	1,274
Barrington Borough	7,418
Bellmawr Borough	13,721
Berlin Borough	5,786
Berlin Township	5,348
Brooklawn Borough	2,133
Camden City	84,910
Chesilhurst Borough	1,590
Clementon Borough	5,764
Collingswood Borough	15,838
Gibbsboro Borough	2,510
Gloucester City	13,121
Gloucester Township	45,156
Haddon Township	15,875
Hi-Nella Borough	1,250
Laurel Springs Borough	2,249
Lawnside Borough	3,042
Lindenwold Borough	18,196
Magnolia Borough	4,881
Mount Ephraim Borough	4,863
Oaklyn Borough	4,223
Pennsauken Township	33,775
Pine Hill Borough	8,684
Pine Valley Borough	23
Runnemede Borough	9,461
Somerdale Borough	5,900
Stratford Borough	8,005
Tavistock Borough	9
Winslow Township	20,034
Woodlynne Borough	2,578

Gloucester County	
Clayton Borough	6,013
Deptford Township	23,473
East Greenwich Township	4,144
Greenwich Township	5,404
Harrison Township	3,585
Logan Township	3,078
Monroe Township	21,639
National Park Borough	3,552
Paulsboro Borough	6,944
Swedesboro Borough	2,031
Washington Township	27,878
Wenonah Borough	2,303
West Deptford Township	18,002
Westville Borough	4,786
Woodbury City	10,353
Woodbury Heights Borough	3,460
Woolwich Township	1,129
	526,069

2ND CONGRESSIONAL DISTRICT

Atlantic County	
All	194,119
Cape May County	
All	82,266
Cumberland County	
All	132,866
Gloucester County	
Elk Township	3,187
Franklin Township	12,396
Glassboro Borough	14,574
Mantua Township	9,193
Newfield Borough	1,563
Pitman Borough	9,744
South Harrison Township	1,486

Salem County	
All	64,676
	526,070

3RD CONGRESSIONAL DISTRICT

Monmouth County	
Allenhurst Borough	912
Asbury Park City	17,015
Atlantic Highlands Borough	4,950
Avon-by-the-Sea Borough	2,337
Belmar Borough	6,771
Bradley Beach Borough	4,772
Deal Borough	1,952
Eatontown Borough	12,703
Fair Haven Borough	5,679
Hazlet Township	23,013
Highlands Borough	5,187
Interlaken Borough	1,037
Keansburg Borough	10,613
Keyport Borough	7,413
Little Silver Borough	5,548
Loch Arbour Village	369
Long Branch City	29,819
Manasguan Borough	5,354
Middletown Township	62,574
Monmouth Beach Borough	3,318
Neptune City Borough	5,276
Neptune Township	28,366
Oceanport Borough	5,888
Ocean Township	23,570
Red Bank Borough	12,031
Rumson Borough	7,623
Sea Bright Borough	1,812
Sea Girt Borough	2,650
Shrewsbury Borough	2,962
Shrewsbury Township	995
Spring Lake Borough	4,215
Spring Lake Heights Borough	5,424
South Belmar Borough	1,566
Tinton Falls Borough	7,740

Union Beach Borough	6,354
West Long Branch Borough	7,380
Ocean County	
Bay Head Borough	1,340
Brick Township	53,629
Dover Township	64,455
Island Heights Borough	1,575
Lakewood Township	38,464
Lavallette Borough	2,072
Mantoloking Borough	433
Point Pleasant Beach Borough	5,415
Point Pleasant Borough	17,747
Seaside Heights Borough	1,802
South Toms River Borough	3,954
	526,074

4TH CONGRESSIONAL DISTRICT

Burlington County	
Bordentown City	4,441
Bordentown Township	7,170
Burlington City	10,246
Burlington Township	11,527
Chesterfield Township	3,867
Eastampton Township	3,814
Fieldsboro Borough	597
Florence Township	9,084
Mansfield Township	2,523
Springfield Township	2,691
Westampton Township	3,383
Mercer County	
East Windsor Township	21,041
Ewing Township	34,842
Hamilton Township	82,801
Hightstown Borough	4,581
Hopewell Borough	2,001
Hopewell Township	10,893
Lawrence Township	19,724

Pennington Borough	2,109
Trenton City	92,124
Washington Township	3,487
Middlesex County	
Jamesburg Borough	4,114
Monroe Township	15,858
Plainsboro Borough	5,605
Monmouth County	
Allentown Borough	1,962
Brielle Borough	4,068
Colts Neck Township	7,888
Englishtown Borough	976
Farmingdale Borough	1,348
Freehold Borough	10,020
Freehold Township	19,202
Holmdel Township	8,447
Howell Township	25,065
Manalapan Township	18,914
Marlboro Township	17,560
Millstone Township	3,926
Roosevelt Borough	835
Upper Freehold Township	2,750
Wall Township	18,952
Ocean County	
Jackson Township	25,644
	526,080

5TH CONGRESSIONAL DISTRICT

Bergen County	
Allendale Borough	5,901
Alpine Borough	1,549
Bergenfield Borough	25,568
Closter Borough	8,164
Cresskill Borough	7,609
Demarest Borough	4,963
Dumont Borough	18,334

Emerson Borough	7,793
Glen Rock Borough	11,497
Harrington Park Borough	4,532
Haworth Borough	3,509
Hillsdale Borough	10,495
Hohokus Borough	4,129
Mahwah Township	12,127
Midland Park Borough	7,381
Montvale Borough	7,318
Northvale Borough	5,046
Norwood Borough	4,413
Oakland Borough	13,443
Old Tappan Borough	4,168
Oradell Borough	8,658
Paramus Borough	26,474
Park Ridge Borough	8,515
Ramsey Borough	12,899
Ridgewood Village	25,208
Rivervale Township	9,489
Rochelle Park Township	5,603
Rockleigh Borough	192
Saddle River Borough	2,763
Tenafly Borough	13,552
Upper Saddle River Borough	7,958
Waldwick Borough	10,802
Washington Township	9,550
Westwood Borough	10,714
Woodcliff Lake Borough	5,644
Wyckoff Borough	15,500
Passaic County	
Bloomingdale Borough	7,867
Haledon Borough	6,607
Hawthorne Borough	18,200
North Haledon Borough	8,177
Ringwood Borough	12,625
Wanague Borough	10,025
West Milford Township	22,750
Sussex County	
Andover Borough	892
Andover Township	4,506

Branchville Borough	870
Frankford Township	4,654
Franklin Borough	4,486
Fredon Township	2,281
Hamburg Borough	1,832
Hardyston Township	4,553
Hopatcong Borough	15,531
Lafayette Township	1,614
Montague Township	2,066
Newton Town	7,748
Ogdensburg Borough	2,737
Sandyston Township	1,485
Sparta Township	13,333
Stanhope Borough	3,638
Sussex Borough	2,418
Vernon Township	16,302
Walpack Township	150
Wantage Township	7,268
	526,075

6TH CONGRESSIONAL DISTRICT

Middlesex County

Carteret Borough	20,598
Edison Township	70,193
Highland Park Borough	13,396
Metuchen Borough	13,762
New Brunswick City	41,442
North Brunswick Township	22,220
Old Bridge Township	51,515
Perth Amboy City	38,951
Sayreville Borough	29,969
South Amboy	8,322
South River Borough	14,361
Woodbridge Township	90,074

Monmouth County

Aberdeen Township	17,235
Matawan Borough	8,837

Union County	
Linden City	37,836
Rahway City	26,723
Roselle Borough	20,641
	526,075

7TH CONGRESSIONAL DISTRICT

Essex County	
Millburn Township	19,543
Middlesex County	
Dunellen Borough	6,593
Middlesex Borough	13,480
Somerset County	
Bound Brook Borough	9,710
Bridgewater Township	29,175
Green Brook Township	4,640
Manville Borough	11,278
North Plainfield Borough	19,108
Warren Township	9,805
Watchung Borough	5,290
Union County	
Berkley Heights Township	12,549
Clark Township	16,699
Cranford Township	24,573
Elizabeth City	106,201
Fanwood Borough	7,767
Garwood Borough	4,752
Kenilworth Borough	8,221
Mountainside Borough	7,118
New Providence Borough	12,426
Plainfield City	45,555
Roselle Park Borough	13,377
Scotch Plains Township	20,774
Springfield Township	13,955
Summit City	21,071

Union Township	50,184
Westfield Town	30,447
Winfield Township	1,785
	526,076

8TH CONGRESSIONAL DISTRICT

Bergen County	
Franklin Lakes Borough	8,769
Essex County	
Belleville Town (part)	
Ward #1—District #2	1,146
Ward #1—District #3	1,112
Ward #1—District #6	926
Ward #1—District #7	976
Ward #1—District #8	2,453
Ward #1—District #9	1,413
Ward #1—District #10	2,547
Ward #1—District #11	2,000
Ward #1—District #12	1,349
Ward #2	16,566
Bloomfield Town	47,792
Glen Ridge Borough	7,855
Montclair Town	38,321
Nutley Town	28,998
Morris County	
Riverdale Borough	2,530
Passaic County	
Clifton City	74,388
Little Falls Township	11,496
Passaic City	52,463
Paterson City	137,970
Pompton Lakes Borough	10,660
Prospect Park Borough	5,142
Totowa Borough	11,448

Wayne Township	46,474
West Paterson Borough	11,293
	526,087

9TH CONGRESSIONAL DISTRICT

Bergen County

Bogota Borough	8,344
Carlstadt Borough	6,166
Cliffside Park Borough	21,464
East Rutherford Borough	7,849
Edgewater Borough	4,628
Elmwood Park Borough	18,377
Englewood City	23,701
Englewood Cliffs Borough	5,698
Fair Lawn Borough	32,229
Fairview Borough	10,519
Fort Lee Borough	32,449
Garfield City	26,803
Hackensack City	36,039
Hasbrouck Heights Borough	12,166
Leonia Borough	8,027
Little Ferry Borough	9,399
Lodi Borough	23,956
Lyndhurst Township	20,326
Maywood Borough	9,895
Moonachie Borough	2,706
New Milford Borough	16,876
North Arlington Borough	16,587
Palisades Park Borough	13,732
Ridgefield Borough	10,294
Ridgefield Park Village	12,738
River Edge Borough	11,111
Rutherford Borough	19,068
Saddle Brook Township	14,084
South Hackensack Township	2,229
Teaneck Township	39,007
Teterboro Borough	19
Wallington Borough	10,741
Wood-Ridge Borough	7,929

Hudson County	
East Newark Borough	1,923
Kearny Town (part)	
Ward #1—District #1	962
Ward #1—District #2	1,109
Ward #1—District #6	1,019
Ward #3	8,578
Ward #4—District #5	836
Ward #4—District #6	1,281
Ward #4—District #7	1,483
Secaucus Town	13,719
	526,066

10TH CONGRESSIONAL DISTRICT

Essex County	
Belleville Town (part)	
Wart #1—District #1	1,414
Ward #1—District #4	1,550
Ward #1—District #5	1,915
East Orange City	77,878
Irvington Town	61,493
Newark City	329,248
Orange City	31,136
Union County	
Hillside Township	21,440
	526,074

11TH CONGRESSIONAL DISTRICT

Essex County	
Caldwell Borough	7,624
Cedar Grove Township	12,600
Essex Fells Borough	2,363
Fairfield Borough	7,987
Livingston Township	28,040
Maplewood Township	22,950

North Caldwell Borough	5,832
Roseland Borough	5,330
South Orange Village Township	15,864
Verona Borough	14,166
West Caldwell Borough	11,407
West Orange Town	39,510

Morris County

Boonton Town	8,620
Boonton Township	3,273
Butler Borough	7,616
Chatham Borough	8,537
Chester Borough	1,433
Chester Township	5,198
Denville Township	14,380
Dover Town	14,681
East Hanover Township	9,319
Florham Park Borough	9,359
Hanover Township	11,846
Jefferson Township	16,413
Kinnelon Borough	7,770
Lincoln Park Borough	8,806
Madison Borough	15,357
Mendham Borough	4,899
Mendham Township	4,488
Mine Hill Township	3,325
Montville Township	14,290
Mountain Lakes Borough	4,153
Mount Arlington Borough	4,251
Mount Olive Township	18,748
Netcong Borough	3,557
Parsippany-Troy Hills Township	49,868
Pequannock Township	13,776
Randolph Township	17,828
Rockaway Borough	6,852
Rockaway Township	19,850
Roxbury Township	18,878
Victory Gardens Borough	1,043
Wharton Borough	5,485

Sussex County	
Byram Township	7,502
Green Township	2,450
Warren County	
Allamuchy Township	2,560
Frelinghuysen Township	1,435
Independence Township	2,829
Liberty Township	1,730
	526,078

12TH CONGRESSIONAL DISTRICT

Hunterdon County	
All	87,361
Mercer County	
Princeton Borough	12,035
Princeton Township	13,683
West Windsor Township	8,542
Middlesex County	
Cranbury Township	1,927
East Brunswick Township	37,711
Helmetta Borough	955
Milltown Borough	7,136
Piscataway Township	42,223
South Brunswick Township	17,127
South Plainfield Township	20,521
Spotswood Borough	7,840
Morris County	
Chatham Township	8,883
Harding Township	3,236
Morris Township	18,486
Morris Plains Borough	5,305
Morristown Town	16,614
Passaic Township	7,275
Washington Township	11,402

Somerset County	
Bedminster Township	2,469
Bernards Township	12,920
Bernardsville Borough	6,715
Branchburg Township	7,846
Far Hills Borough	677
Franklin Township	31,358
Hillsborough Township	19,061
Millstone Borough	530
Montgomery Township	7,360
Peapack Gladstone Borough	2,038
Raritan Borough	6,128
Rocky Hill Borough	717
Soverville Borough	11,973
South Bound Brook Borough	4,331
Sussex County	
Hampton Township	3,916
Stillwater Township	3,887
Warren County	
Alpha Borough	2,644
Belvidere Town	2,475
Blairstown Township	4,360
Franklin Township	2,341
Greenwich Township	1,738
Hackettstown Town	8,850
Hardwick Township	947
Harmony Township	2,592
Hope Township	1,468
Knowlton Township	2,074
Lopatcong Township	4,998
Mansfield Township	5,780
Oxford Township	1,659
Pahaquarry Township	26
Phillipsburg Town	16,647
Pohatcong Township	3,856
Washington Borough	6,429

Washington Township	4,243
White Township	2,748
	526,063

13TH CONGRESSIONAL DISTRICT

Burlington County

Bass River Township	1,344
Beverly City	2,919
Cinnaminson Township	16,072
Delanco Township	3,730
Delran Township	14,811
Edgewater Park Township	9,273
Evesham Township	21,508
Hainesport Township	3,236
Lumberton Township	5,236
Medford Lakes Borough	4,958
Medford Township	17,622
Moorestown Township	15,596
Mount Holly Township	10,818
Mount Laurel Township	17,614
New Hanover Township	14,258
North Hanover Township	9,050
Pemberton Borough	1,198
Pemberton Township	29,720
Riverside Township	7,941
Shamong Township	4,537
Southhamption Township	8,808
Tabernacle Township	6,236
Washington Township	808
Willingboro Township	39,912
Woodland Township	2,285
Wrightstown Borough	3,031

Camden County

Audubon Borough	9,533
Cherry Hill Township	68,785
Haddonfield Borough	12,337
Haddon Heights Borough	8,361
Merchantville Borough	3,972

Voorhees Township	12,919
Waterford Township	8,126

Ocean County

Barnegat Township	8,702
Barnegat Light Borough	619
Beach Haven Borough	1,714
Beachwood Borough	7,687
Berkeley Township	23,151
Eagleswood Township	1,009
Harvey Cedars Borough	363
Lacey Township	14,161
Lakehurst Borough	2,908
Little Egg Harbor Township	8,483
Long Beach Township	3,488
Manchester Township	27,987
Ocean Gate Borough	1,385
Ocean Township	3,731
Pine Beach Borough	1,796
Plumsted Township	4,674
Seaside Park Borough	1,795
Ship Bottom Borough	1,427
Stafford Township	10,385
Surf City Borough	1,571
Tuckerton Borough	2,472
	526,062

14TH CONGRESSIONAL DISTRICT

Hudson County

Bayonne City	65,047
Guttenberg Town	7,340
Harrison Town	12,242
Hoboken City	42,460
Jersey City	223,532
Kearny Town (part)	
Ward #1—District #3	1,045
Ward #1—District #4	1,245
Ward #1—District #5	1,103
Ward #2	10,506

Ward #4—District #1	1,174
Ward #4—District #2	1,673
Ward #4—District #3	846
Ward #4—District #4	1,323
Ward #4—District #8	1,552
North Bergen Township	47,019
Union City	55,593
Weehawken Township	13,168
West New York Town	39,194
	526,062

APPENDIX B

[Caption Omitted in Printing]

ORDER ON MANDATE

[Filed Dec. 19, 1983]

This matter having been heard by the three-judge court on February 19 and 26, 1982, and plaintiffs' applications for preliminary and permanent injunctive relief having been consolidated pursuant to rule 65(a) of the Federal Rules of Civil Procedure, and the court having considered the proofs adduced by the original and intervening parties and the oral argument and submission of counsel, and the court having filed its written opinion on March 3, 1982, and good cause appearing therefor, it is, on this 19th day of December, 1983,

ORDERED, ADJUDGED AND DECREED that judgment be, and it hereby is, entered in favor of plaintiffs and against defendants and defendants-intervenors as provided herein; and it is further

ORDERED, ADJUDGED, AND DECREED that that apportionment of congressional districts constituted by this court in *David v. Cahill* be, and it hereby is, declared unconstitutional in light of the 1980 decennial census; and it is further

ORDERED, ADJUDGED AND DECREED that P.L. 1982, c.1 of the State of New Jersey be, and it hereby is, declared unconstitutional as violative of plaintiffs' rights under Article I, § 2 of the Constitution of the United States; and it is further

ORDERED, ADJUDGED AND DECREED that defendants Thomas H. Kean, Irwin Kimmelman and Jane Burgio be, and they hereby are, preliminarily and permanently enjoined from conducting primary or general

congressional elections under the terms of P.L. 1982, c.1; and it is further

ORDERED, ADJUDGED AND DECREED that all counterclaims and crossclaims asserted by the intervenors herein be, and they hereby are, dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the New Jersey Legislature and Governor be, and they hereby are granted until February 3, 1984, to enact a new constitutional plan for reapportionment; and it is further

ORDERED, ADJUDGED AND DECREED that if the Legislature does not enact a new constitutional plan by February 3, 1984, this court will convene on February 7, 1984, to undertake further proceedings; and it is further

ORDERED, ADJUDGED AND DECREED that by January 31, 1984, the parties will exchange lists of witnesses and any witness not listed will not be permitted to testify; and it is further

ORDERED, ADJUDGED AND DECREED that the parties hold witnesses available for taking of depositions from January 31, 1984, through February 6, 1984.

/s/ John J. Gibbons
JOHN J. GIBBONS
Judge
United States Court of Appeals

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
Chief Judge
United States District Court

/s/ Stanley S. Brotman
STANLEY S. BROTMAN
Judge
United States District Court

[Caption Omitted in Printing]

ORDER

[Filed Feb. 17, 1984]

It is on this 17th day of Feb., 1984

ORDERED, ADJUDGED and DECREED that primary elections and elections for members of the House of Representatives shall be conducted, in New Jersey, until the further order of this court, or until the next decennial census, whichever is later, from the single member districts set forth in the Opinion filed herewith.

/s/ John J. Gibbons
JOHN J. GIBBONS
Circuit Judge

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
Chief District Judge

/s/ Stanley S. Brotman
STANLEY S. BROTMAN
District Judge

[Caption Omitted in Printing]

ORDER

[Filed March 5, 1984]

It is on this 5th day of March, 1984, ORDERED that the judgment be and the same is hereby amended to correct a clerical error. As amended the judgment should read:

"ORDERED, ADJUDGED and DECREED that the primary elections and elections for members of the House of Representatives shall be conducted, in New Jersey, until the further order of this court, or until the next decennial census, whichever is earlier, from the single member districts set forth in the Opinion filed herewith."

And it is further ORDERED that the final paragraph of the Opinion be and the same is hereby amended to conform to this Order.

/s/ John J. Gibbons
JOHN J. GIBBONS
Circuit Judge

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
Chief District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 82-297

GEORGE T. DAGGETT,
Plaintiff,

v.

IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey, *et al.*,
Defendants.

—and—

Civil Action No. 82-388

EDWIN B. FORSYTHE, *et al.*,
Plaintiffs,

vs.

THOMAS H. KEAN, Governor of the State of New Jersey, *et al.*,
Defendants.

JAMES J. FLORIO, *et al.*,
Intervenors

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James J. Florio, et al, Carmen A. Orechio, et al, Alan J. Karcher, et al, intervenors above named, hereby appeal to the Supreme Court of the United States, from the Order entered by the three Judge Court, on February 17, 1984, in this action, on re-

mand from the Supreme Court, said Order setting forth the Congressional Districts for New Jersey until the further order of the court, or until the next decennial census, whichever is later. This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ Leon J. Sokol
LEON J. SOKOL
Greenstone and Sokol
39 Hudson Street
Hackensack, New Jersey 07601
Counsel for Intervenor,
Carmen A. Orechio

/s/ Kenneth J. Guido, Jr.
KENNETH J. GUIDO, JR.
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Counsel for Intervenors,
Florio, *et al.*

/s/ Lawrence T. Marinari
LAWRENCE T. MARINARI
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Trenton, New Jersey 08618
Counsel for Intervenor,
Alan J. Karcher

[Filed March —, 1984]

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 82-297

GEORGE T. DAGGETT,
Plaintiff,

v.

IRWIN I. KIMMELMAN, Attorney General of the State of New Jersey, *et al.*,
Defendants.

—and—

Civil Action No. 82-388

EDWIN B. FORSYTHE, *et al.*,
Plaintiffs,

v.

THOMAS H. KEAN, Governor, *et al.*
Defendants.

JAMES J. FLORIO, *et al.*,
Intervenors

AFFIDAVIT OF THOMAS E. MANN

1. My name is Thomas E. Mann. I reside at 5407 Greystone Street, Chevy Chase, Maryland.

2. I am presently employed as Executive Director of the American Political Science Association, a position I have held since July, 1981. Prior to this position, I was co-director of the Congress Project at the American En-

terprise Institute, and assistant director of the American Political Science Association. Since 1970, I have worked as a staff associate and then as assistant director of the American Political Science Association, an adjunct professor at five universities, a political polling consultant to the Democratic Study Group Campaign Fund, and a marketing research consultant to the Public Broadcasting Service.

3. I am a professional political scientist with a Ph.D. (in political science) from the University of Michigan. I have specialized in the study of congressional elections throughout my professional career, both as a scholar and as a political pollster. I served as a charter member of the Standing Committee on Congressional Election Research, National Elections Studies, Center for Political Studies, during 1977 and 1978.

4. My publications include *Unsafe At Any Margin: Interpreting Congressional Elections, Vital Statistics on Congress 1980* (with John Bibby and Norman Ornstein), *The New Congress* (with Norman Ornstein), "Candidates and Parties in Congressional Elections" (with Raymond Wolfinger), and "The Republican Surge in Congress" (with Norman Ornstein), among others. I am an adjunct scholar at the American Enterprise Institute and in that capacity, I am currently preparing a study of the 1984 elections. A copy of my resume is attached as Exhibit 1.

5. I have been asked by the attorneys for the intervenors, James J. Florio, *et al.*, to analyze several redistricting plans that were pending before the 200th Legislature of the State of New Jersey, and which are currently pending before the 201st Legislature of the State of New Jersey, including statistical analyses which contain election results of prior elections and demographic data on the congressional districts contained within each plan, and to comment specifically on Senate Bill 3564 introduced in the 200th Legislature by Senator Lynch and reintroduced

as Senate Bill 10 in the 201st Legislature by Senator Lynch.

6. All of these plans have unusually low deviations. A.4126 has a total deviation of 67 persons from the highest to the lowerst district, as does S.3564 (S.10). A.4087 has a deviation of 63 persons, and S.3784 has a total deviation of 60 persons. When expressed as a percentage, all of these plans have a total deviation of 0.01%.

7. When analyzed for mean deviation (as opposed to total deviation) I arrive at the following conclusions. A.4126 has a mean deviation of 10.92 persons or 0.002%, S.3564 has a mean deviation of 11.5 persons or 0.002%, S.3784 has a mean deviation of 11.92 persons or 0.002%, and A.4087 has a mean deviation of 13.21 persons or 0.003%.

8. Based upon the foregoing data, all of these plans are essentially equal in total deviation and are very close to absolute equality.

9. I also note that all of the aforementioned plans do not disturb municipal boundaries, a criterion adopted by the New Jersey Legislature in enacting Public Law 1982, Chapter 1, and in passing S.3564, which was subsequently vetoed by Governor Kean.

10. I have analyzed the plans for political fairness. I began by examining the 1978, 1980 and 1982 U.S. Congressional elections, the 1981 and 1983 State Senate elections and the 1981 and 1983 State Assembly elections to determine if the congressional districts under S.3564 and the other plans produced results that accurately reflected the statewide vote. The data for these and other elections were furnished to me by the office of Legislative Services of the New Jersey legislature and are attached to the Affidavit of Harold Berkowitz. I noted that the district results under S.3564 fairly reflected the statewide vote. In particular, in the two elections in which the Republi-

cans won a statewide majority of votes (1980 Congressional and 1981 State Assembly), a majority of S.3564 districts were carried by the Republicans. Using the test of fairness devised by Backstrom, *et al.* (*Minnesota Law Review*, Vol. 62 (1978), 1121-1159), that the majority party, when it has received a bare majority of the statewide vote, be in the majority in a bare majority of the districts, I conclude that S.3564 is fair.

There are problems, however, in using local races as a measure of natural party strength. "Gauging party strength by using the sum of party votes in individual districts instead of the vote totals for some common statewide race contaminates the results with the effects of a multitude of candidate personalities, campaign techniques, and strictly local issues." (Backstrom, *et al.*, p. 1127). Research on congressional elections has demonstrated conclusively that voting in House elections is strongly influenced by the presence of an incumbent and by the visibility and character of the local campaign. Party identification has become much less important in House elections. Consequently, it is inappropriate to use House or state legislative elections as a sole measure of natural party strength. I have chosen three recent statewide elections, namely the 1980 presidential election, the 1981 gubernatorial election, and the 1982 U.S. Senate election. These three elections allow us to analyze the political configuration of the districts under very different partisan conditions. The Republicans decisively won the 1980 presidential vote in New Jersey by a margin of 52% to 39%; they narrowly won the 1981 gubernatorial election, with the returns at a near 50% to 50% dead heat; the Republicans lost a close race in 1982 for the U.S. Senate by a margin of 48% to 51%. None of these elections can by itself serve as a measure of natural party strength, but a reasonable test of political fairness can be performed by examining the proposed districts for all three of them. My observations are as follows:

S.3564: the Republican candidate carried 11 out of the 14 districts in 1980, 8 out of the 14 in 1981 and 6 out of the 14 in 1982.

A.4087: the Republican candidate carried 12 out of the 14 districts in 1980, 7 out of 14 in 1981 and 5 out of 14 in 1982.

S.3784: the Republican candidate carried 12 out of of the 14 districts in 1980, 7 out of the 14 districts in 1981, and 5 out of the 14 districts in 1982.

A.4126: the Republican candidate carried 12 out of the 14 districts in 1980, 7 out the 14 districts in 1981, and 6 out of the 14 districts in 1982.

My conclusion from the above results is that none of these plans appears to give either party a significant advantage. When the statewide returns exhibits a decisive Republican victory (as in the 1980 presidential election), the districts under all four plans are swept by the Republicans (79% of the district under S.3564, 86% under the others). When the election is close statewide, the districts divide more evenly between the parties. Under S.3564, the 1981 and 1982 statewide winners carry a majority of districts. Consequently, the district results under S.3564 fairly reflect the statewide results, and neither party is prevented from winning a majority of districts when it achieves a statewide majority of votes. Under the other plans, the Republicans fail to carry a majority of districts in the 1981 gubernatorial election, even though they won statewide. Moreover, under two of the other plans, Republicans carry one less district in the 1982 senate election than under S.3564. Surprisingly, in the two closely contested elections, Republicans fare best under S.3564. Again, using the test of political fairness developed by Backstrom, *et al.*, I conclude that S.3564 provides for districts that are fair to the two parties.

11. I also note that S.3564 (S.10) is very similar in configuration to P.L. 1982, c.1, the plan held invalid by

the U.S. Supreme Court in *Karcher* v. *Daggett*. The congressional elections in New Jersey in 1982 were held in districts based upon P.L. 1982, c.1, and in those elections, every incumbent congressman except one won reelection. That incumbent, Congressman Hollenbeck, suffered at least as much from adverse national political tides and a vigorous challenge from the Democratic candidate as he did from redistricting. Hollenbeck lost many municipalities in the 1982 elections that he had represented in his old district and had carried in previous elections, and by margins comparable to those by which he lost in the new part of the district. The fact that all the other New Jersey congressional incumbents won in 1982 is *prima facie* evidence of the political fairness of P.L. 1982, c.1, with regard to incumbents of both parties.

12. I have been asked to comment on whether it is appropriate for a legislature to seek to protect incumbents in its redistricting plan. I believe that this practice is quite common across the states and is particularly understandable for a northeastern industrial state such as New Jersey. Research has demonstrated that senior members of a delegation, because of their seniority on important congressional committees, are in a position to help the State secure federal funds. Consequently, it is perfectly rational for a state legislature to try to protect its congressional incumbents as a matter of state policy.

13. I have been asked my opinion as to whether S.3564 would be considered a "partisan gerrymander". To this question, I must respond that I assume that Democratic and Republican legislators have sought in their districting plans to gain some advantage for their respective parties. I believe that such partisan interests are inevitably a part of the legislative process and therefore of the redistricting process. What is more important than intentions are results—whether either party will actually gain a significant and unfair advantage as a result of redistricting. It is my opinion that question must be answered in the

negative. When tested with appropriate measures of statewide partisan strength, S.3564 appears to be politically fair, in that it gives neither party an unusual or unreasonable political advantage over the other. In that regard, it would not qualify as a "partisan gerrymander," as defined in the test set forth by Justice Stevens in his concurrence in *Karcher* v. *Daggett*.

14. I note that in all of the above mentioned plans, the sponsors adhere to contiguity of districts, and on that basis, all of the plans are equally acceptable. Similarly, as previously noted, all plans recognize and respect municipal lines and, on that basis, are equal.

15. In analyzing the demographic data, all of the plans maintain a majority of Black and Hispanic persons in District 10, the District which includes the City of Newark. But, in both A.4087 and S.3784, some minority strength is sacrificed in order to achieve a negligible reduction in population deviation. A.4087 has a total deviation of 63 persons and S.3784 has a total deviation of 60 persons, as compared to 67 persons in S.3564. In both cases, the plans reduced the total Black and Hispanic population in District 20 by 3,840 persons in order to achieve this small reduction in deviation. A later bill, A.4126, introduced by Assemblyman Zimmer, appears to recognize this trade-off. This plan uses the same basic map configuration of A.4087 and S.3784, but restores District 10 to the same configuration as that contained in S.3564. In so doing, A.4126 restores the Black and Hispanic populations of District 10 to the same as in S.3564 but also results in a total deviation of 67 persons, equal to that of S.3564. Accordingly, it appears that it is not possible to maximize the minority population of District 10 with any total deviation lower than 67 persons.

16. I have also been asked my opinion on the issue of dislocation of voters from their prior election district. Substantial dislocation is inevitable after the de-

cennial census, particularly in a state which has lost a congressional district, such as New Jersey, and is trying to fit its population into a smaller number of districts. Additionally, I note that since 1970 New Jersey has experienced a shift in population from the more urbanized counties to the suburban and rural counties, further exaggerating the problems of dislocation for the decennial redistricting. Many New Jersey voters were dislocated by the districts set in P.L. 1982, c.1. The issue now, however, is whether the current districts or those last in effect during the 1980 elections constitute the most appropriate base for measuring future dislocation. I believe it important to minimize dislocation from present districts in any subsequent redistricting. Voters have now had two years to become accustomed to their congressman and his or her district offices and staff. They are ill-served by interruptions in representations in the handling of important casework caused by the redrawing of district lines outside the normal decennial census.

With this background, I note the following as to the four plans offered for my review with regard to population dislocation. I am using the statistics provided to me by the Office of Legislative Service, Division of Information and Research. That office has taken each plan and compared it to P.L. 1982, c.1, using as the basic standard whether a municipality stays with its current incumbent congressman or moves to a district currently represented by another congressman. That analysis shows that in the case of S.3564, there is a total dislocation of 726,513 persons or 9.86% of the State's population. In the case of S.3784, there is a dislocation of 2,540,176 persons or 34.5% of the State's population. In the case of A.4126, there is a dislocation of 2,400,073 persons or 32.6% of the State's population, and in the case of A.4087, there is a total dislocation of 2,482,021 persons or 33.7% of the State's population.

17. I have been asked my opinion on the controversy surrounding the shapes of the districts in P.L. 1982, c.1,

and S.3564. There is some historical precedent for the configurations of the districts in S.3564. Upon examination of the maps of the 1950, 1960 and 1970 New Jersey congressional districts, it appears that the Fifth District of S.3564 encompasses parts of Bergen and Passaic counties and Sussex, Warren and Hunterdon counties, all of which have traditionally been districted together; the Fourth District encompasses Mercer and Burlington counties which have been historically grouped together and the Third District includes Mommouth and Ocean counties and also has historical precedent. In any event, the shape of the districts in S.3564 is due in part to the fact that municipal boundaries have been respected. The 567 municipalities in the State of New Jersey are of widely varying size and shape. Using these municipalities as building blocks for congressional districts inevitably results in districts less compact that might otherwise be achieved. There is no consequences among political scientists as to what constitutes "compactness" in electoral districts, or even how such a concept can be best measured. There is a general agreement, however, that districts which lack "compactness" are not necessarily "gerrymandered," nor do they inevitably damage communities of interest or other positive values sought in a redistricting plan.

Signed under the pains and penalties of perjury:

/s/ Thomas E. Mann
THOMAS E. MANN

Date: Feb. 2, 1984

EXHIBIT 1

THOMAS E. MANN

Present Position

Executive Director, American Political Science Association, 1527 New Hampshire Avenue, NW, Washington DC 20036 (202) 483-2512, 1981 to present.

Professional Experience

Visiting Fellow and Co-Director, Congress Project (1979 to 1981) and Adjunct Scholar (1981 to present), American Enterprise Institute for Public Policy Research.

Chairman, Executive Committee, Consortium of Social Science Associations, 1982 to present.

Assistant Director (1977 to 1981), Staff Associate (1970 to 1976) and Director, Congressional Fellowship Program (1970 to 1980), American Political Science Association.

Adjunct Professor, University of Virginia (1980), Georgetown University (1979), Catholic University (1978), American University (1977), University of Massachusetts (1973-74).

Member, Technical Advisory Committee, Democratic National Committee's Commission on Presidential Nominations (Hunt Commission), 1981 to 1982.

Speaker, William Bennett Munro Memorial Lecture, Stanford University, May 12, 1983.

Speaker, Conference for Democratic Senators, Canaan Valley, West Virginia, October 2-4, 1981.

Lecturer, Congressional Quarterly Elections Seminars, 1980 to present.

Lecturer, U.S. Information Agency: Yugoslavia and Israel, May 1980; Wales, January 1981.

Marketing Research Consultant, Public Broadcasting Service, 1978 to 1981.

Political Polling Consultant, Democratic Study Group Campaign Fund, 1974 to 1978.

Member, Standing Committee on Congressional Elections Research, National Elections Studies, Center for Political Studies, 1977 to 1978.

Member, Democratic National Committee's Commission on Presidential Nomination and Party Structure (Winograd Commission), 1975 to 1978.

APSA Congressional Fellow, 1969-70. Served as legislative assistant to Representative James G. O'Hara and Senator Philip A. Hart.

Assistant Study Director, Survey Research Center, and Instructor, ICPSR Summer Program, University of Michigan, 1968-69.

Education

B.A., 1966, University of Florida (Phi Eta Sigma, Phi Kappa Phi, political science honors program, cum laude)

M.A., 1968, and Ph.D., 1977, University of Michigan. (NDEA graduate fellowship)

Selected Publications

"Mobilization of Liberal Strength in the House, 1955-1970: The Democratic Study Group," *American Political Science Review*, Volume 68 (June 1974), pp. 667-681. (With A. Miller and A. Stevens) Reprinted in Robert L. Peabody and Nelson W. Polsby (eds.), *New Perspectives on the House of Representatives* (Third Edition, Chicago: Rand McNally, 1977).

Career Alternatives for Political Scientists: A Guide for Faculty and Graduate Students (American Political Science Association, 1976).

Unsafe at Any Margin: Interpreting Congressional Elections (Washington, DC: American Enterprise Institute, 1978).

Articles in the *Washington Post* (1979), *San Diego Union* (1980), *Baltimore Sun* (1981).

"Candidates and Parties in Congressional Elections," *American Political Science Review*, September 1980. (With R. Wolfinger) Reprinted in Louis Sandy Maisel and Joseph Cooper, *Congressional Elections*, Sage Electoral Studies Yearbook, Volume 6 (Beverly Hills: Sage, 1981).

Vital Statistics on Congress 1980 (Washington DC: American Enterprise Institute, 1980). (With J. Bibby and N. Ornstein)

"1980: A Republican Revival in Congress?" *Public Opinion* (Oct/Nov 1980). (With N. Ornstein)

"Congress and the President: A Response to Lloyd Cutler," *Foreign Affairs* (Winter 1980-1981). (With N. Ornstein) Reprinted in Thomas E. Cronin (ed.) *Rethinking the Presidency* (Boston: Little Brown, 1982).

The New Congress (Washington, DC: American Enterprise Institute, 1981). (Co-editor with N. Ornstein and author of "Elections and Change in Congress.")

"The Republican Surge in Congress" in Austin Ranney (ed.), *The American Elections of 1980* (Washington, DC: American Enterprise Institute, 1981). (With N. Ornstein)

"The 1982 Election: What Will It Mean?" *Public Opinion* (June/July 1981). (With N. Ornstein)

"United States Congressmen in Comparative Perspective," paper presented at a conference on "The Role of Parliamentarians in Contemporary Democracies," Madrid, Spain, December 15-16, 1981. (To appear in Ezra N. Suleiman, ed., *Parliaments and Parliamentarians in Western Democracies.* (New York: Holmes & Meier, 1984).

"Changes in the External Political Environment of Congress: Implications for Presidential Leadership," in James Sterling Young (ed.), *Problems and Prospects of Presidential Leadership in the Nineteen-Eighties,* Volume II (Lanham, MD: University Press of America, 1982).

Vital Statistics on Congress 1982 (Washington, D.C.: American Enterprise Institute, 1982). (With N. Ornstein, M. Malbin and J. Bibby).

"Election '82: The Voters Send a Message," *Public Opinion* (December/January 1983). (With N. Ornstein).

The American Elections of 1982 (Washington, D.C.: American Enterprise Institute, 1983.) (Co-editor with N. Ornstein).

Personal Data

Born September 10, 1944 in Milwaukee, Wisconsin
Married to Sheilah Mann
Two children, Teddy (born May 18, 1977) and Stephanie (born March 10, 1979)

Home: 5407 Greystone Street
Chevy Chase, Maryland 20815
(301) 656-8437

October 1983

OFFICE OF LEGISLATIVE SERVICES
DIVISION OF INFORMATION AND RESEARCH

ELECTION DATA AGGREGATED BY
S-10

S-10	1978 U.S. SEN. DEMS.	1978 U.S. SEN. REPS.	MARGIN	1978 U.S. CONG. DEMS.	1978 U.S. CONG. REPS.	MARGIN	1980 PRES. DEMS.	1980 PRES. REPS.	MARGIN
01	78849	51330	27519	104312	32735	71577	86523	94933	-8410
02	75030	63456	9574	98315	43335	54980	81158	112228	-31070
03	78251	63488	14763	77359	61124	16235	74797	124040	-49243
04	81254	53048	28206	69564	62423	7141	94584	88639	5945
05	69361	82176	-12815	70972	82383	-11411	65776	140302	-74526
06	81614	52105	29509	59870	59671	199	88716	106657	-17941
07	74527	62466	12061	51110	83540	-32430	84794	108547	-23753
08	63261	51781	11480	76407	36268	40139	72676	101676	-29000
09	99665	69987	29678	84023	77558	6465	93844	129216	-35372
10	63563	21212	42351	71619	12865	58754	90610	35452	55158
11	85374	70373	15001	90530	59064	31466	85519	126324	-40805
12	66845	89466	-22618	44091	114095	-70004	68998	147491	-78493
13	68381	71058	-2677	42128	75320	-12892	47693	132909	-85216
14	95208	40153	55055	80996	33469	47527	90003	89512	491
** TOTAL **	1001186	844099	237087	1041596	833850	207746	1145691	1537926	-392235

APPENDIX E

EXHIBIT TO THE AFFIDAVIT OF HAROLD BERKOWITZ

1980 U.S. SEN. DEMS.	1980 U.S. SEN. REPS.	MARGIN	1980 U.S. CONG. DEMS.	1980 U.S. CONG. REPS	MARGIN	1981 GOV. DEMS.	1981 GOV. REPS.	MARGIN
84868	60193	24675	144962	48926	96036	115795	49813	65982
79409	76721	2688	117085	73889	43196	79287	90819	-11532
82360	83207	-847	98752	102144	-3392	73731	91429	-17698
87065	65999	21066	74970	103832	-28862	90443	63950	26493
63759	104573	-40814	74896	139990	-65094	59247	112630	-53383
84621	67851	16770	93685	94955	-1270	85586	77454	8132
79201	83329	-4128	60670	128235	-67565	77150	87529	-10379
72093	57959	14134	97933	67185	30748	68093	77343	-9250
102954	82673	20281	109013	124796	-15783	98942	91593	7349
70622	22175	48447	96225	[illegible]	72061	76148	25883	50265
84178	86027	-1849	103301	90612	9689	84486	97785	-13379
59803	119493	-59690	41287	181542	-140255	59681	123739	-64058
73169	92425	-19256	90439	115018	-24579	83624	91938	-8314
90868	43768	47100	106129	68890	37239	93725	55725	38000
1114970	1046393	68577	1308347	1367178	-58831	1145850	1137630	8220

OFFICE OF LEGISLATIVE SERVICES
DIVISION OF INFORMATION AND RESEARCH

ELECTION DATA AGGREGATED ON
S-10

S-10	1981 STATE SENATE DEMS.	1981 STATE SENATE REPS.	MARGIN	1981 STATE ASSEMBLY DEMS.	1981 STATE ASSEMBLY REPS.	MARGIN	1982 U.S. CONG. DEMS.	1982 U.S. CONG. REPS.	MARGIN
01	97438	61271	36167	185419	119390	66029	100868	44040	56828
02	81732	84807	-3075	147724	171677	-24453	102724	47253	55471
03	76485	83316	-6831	148239	165186	-16947	102130	62323	39815
04	95192	65861	29331	163918	129697	34221	76591	82953	-6362
05	52461	115848	-63387	100421	216137	-115716	59199	103564	-44365
06	85828	63870	21958	176447	119289	57158	96410	50271	46139
07	70537	82514	-11977	147208	154574	-7366	73455	87161	-13706
08	73515	61995	11520	129314	132326	-3012	88184	38787	49397
09	97295	81369	15926	183874	162379	20695	101017	81051	19966
10	68640	20051	48589	130904	37945	92959	76684	14551	62133
11	80647	85887	-5240	150066	179270	-29204	103785	58901	44884
12	55068	118760	-63692	104505	229378	-124873	56204	116015	-59811
13	71690	97659	-25969	136512	194957	-58445	68835	93629	-24794
14	87268	43672	43596	175639	88604	87035	91802	33818	57984
** TOTAL **	1083796	1066880	16916	2078890	2100909	-21919	1205896	914317	291579

1983 STATE SENATE DEMS.	1983 STATE SENATE REPS.	MARGIN	1983 STATE ASSEMBLY DEMS.	1983 STATE ASSEMBLY REPS	MARGIN
66889	46900	19988	130459	93283	37176
60491	76819	-16328	122052	145606	-23554
73750	60678	13072	132021	134614	-2593
80248	44998	35250	144212	99434	44778
44370	80888	-36518	83892	158064	-74172
69169	51589	17580	142728	97169	45559
60815	56493	4322	119891	107925	11966
61628	46728	14900	111795	88432	23363
79445	57991	21454	121025	146765	-25740
41428	13742	27686	77470	25576	51894
63847	61472	2375	121543	119812	1731
42441	86180	-43739	80973	166631	-85658
56637	74108	-17471	103815	145956	-42141
52912	31385	21527	121509	61058	60451
854061	709971	64090	1613385	1590325	23060

No. 83-1524

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

A-740

ALAN J. KARCHER, SPEAKER
NEW JERSEY ASSEMBLY, et al.,
Appellants,

v.

GEORGE T. DAGGETT, et al.,
Appellees.

On Appeal From the United States District Court
for the District of New Jersey

APPLICATION TO THE HONORABLE WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT, FOR A STAY PENDING FINAL DISPOSITION OF THE APPEAL

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*Counsel of Record

March 15, 1984

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. _____

ALAN J. KARCHER, SPEAKER
NEW JERSEY ASSEMBLY, et al.,
Appellants,

v.

GEORGE T. DAGGETT, et al.,
Appellees.

On Appeal From the United States District Court
for the District of New Jersey

APPLICATION TO THE HONORABLE WILLIAM J. BRENNAN, JR.,
ASSOCIATE JUSTICE OF THE SUPREME COURT, FOR A STAY
PENDING FINAL DISPOSITION OF THE APPEAL

To the Honorable William J. Brennan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Third Circuit:

Applicants Alan J. Karcher, Speaker of the New Jersey Assembly, Carmen A. Orechio, President of the New Jersey Senate, and Bernard J. Dwyer, James A. Florio, James J. Howard, William J. Hughes, Joseph J. Minish, Robert A. Roe, and Peter W. Rodino, Jr., Democratic members of the Congress from New Jersey, pray that, in the event that the Court does not take final action by Friday, April 13, 1984, on applicants' Jurisdictional Statement filed concurrently with this Application (and attached as Exhibit A), an order be entered directing that the upcoming primary and general elections for Congress in New Jersey be held under Plan A proposed by applicants to the district court.

In Karcher v. Daggett, ____ U.S. ____, 103 S.Ct. 2653 (1983), the Court held the New Jersey statute establishing congressional districts unconstitutional on the sole ground that its population deviation (3,764 people between the largest and smallest districts, or 0.6984%) did not come as close as practicable to absolute population equality.

On remand, applicants presented the district court with a plan ("Plan A," or "the Senate plan") which that court found was "virtually identical" to the existing state statute except that it reduced the population devation from 3,764 people to 67 -- one-fiftieth the size of the prior deviation and, so far as applicants are aware, smaller than any legislatively enacted plan in the nation. The district court rejected this plan and ordered implementation of a radically different plan, proposed by the State's Republican congressional delegation, which if carried into effect will shift almost a third of the State' citizens into new districts and require them to familiarize themselves with new candidates before the upcoming primary and general elections. 1/ The district court preferred its plan because it had the "great advantages" of more compact districts and an infinitesimal improvement in population equality, from 67 people to 25 people out of the 526,072 in an average district. Opinion, J.S. App. 12a.

This is patent error under Upham v. Seamon, 456 U.S. 37 (1982), and White v. Weiser, 412 U.S. 783 (1973). If the district court's order remains in effect, New Jersey congressional elections will go forward under districts that concededly bear little relationship to those established by state law. If the Court cannot take final action in this case by April 16, 1984, an order should be entered that the elections be

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1/ The district court's plan shifts 2,335,308 people (31.7% of the State's population) into new districts. By contrast, the plan proposed by applicants would shift only 9.9% of the state's population into new districts.

held under Plan A submitted by applicants below, which adheres as closely as possible to the districts established by state law and reduces the population deviations to among the best in the nation. In support Appellants state as follows:

I. STATEMENT

On January 19, 1982 New Jersey enacted a reapportionment plan for the election of United States representatives (P.L. 1982, c.1, "the State plan"). The State plan, as required by the 1980 decennial census data, reduced the number of districts from 15 to 14.

The State plan created 14 districts with an average population deviation of 0.135% and a maximum deviation between the smallest and largest district of 3,674 people, or 0.6984%.

A three-judge district court held the enacted plan unconstitutional under Kirkpatrick v. Preisler, 394 U.S. 526 (1969), and this court in Karcher v. Daggett, _____ U.S. _____, 103 S.Ct. 2653 (1983), affirmed. Affirmance was on the sole ground that the deviation in population from one district to another was too great to stand unless the appellants could show that the deviation was required on the basis of some legitimate and consistently applied state policy. The Court held that the appellants had failed to show such justification. The Court pointed out simple ways in which shifts of population from one district to another could significantly reduce the deviation, "within the basic framework" of the State plan. Id., at _____ n.10, 103 S.Ct. at 2663 n.10. The dissenting Justices (Justice White, joined by the Chief Justice, Justice Powell and Justice Rehnquist) would have upheld the statute on the ground that the deviations, given the inaccuracy of the census data, were insignificant.

Justice Stevens, concurring with the majority, and Justice Powell, with the dissent, would have had the Court also consider the shape of districts and the presence

or absence of "political gerrymandering" as a part of the constitutionality of the redistricting. Neither Justice, however, was willing to say that on the record before the Court any unconstitutional gerrymander had taken place. 103 S.Ct. at 2677 (Stevens, J.), 2690 (Powell, J.). With no member of the Court finding a constitutional infirmity in the plan other than population inequality, and the opinion of the Court squarely based on the population issue alone, the case returned to the district court.

On remand, the district court gave the legislature and governor until February 3, 1984, to adopt a constitutionally valid congressional redistricting plan. (Order of December 19, 1983, J.S. App. 32a). A plan was then introduced in the New Jersey legislature (S. 3564) that made the corrections to the State plan suggested by the Supreme Court and additional corrections which reduced the overall deviation even further from 3,746 people (0.69%) to 67 people (0.01%). The lowest district's population was 526,020. The highest was 526,087. The average deviation of all the districts was 11.5 people (0.002%). S. 3564 achieved these equalities without violating any municipal boundaries.

The deviations had thus been brought dramatically beneath those discussed with approval by the Court in footnote 10 of Karcher v. Daggett (0.449% maximum deviation). Both houses of the New Jersey legislature adopted the plan within the time limit set by the district court. The governor, a Republican, vetoed the plan.

As a result of the veto, the New Jersey legislature did not meet the February 3, 1984 date set by the district court for legislative enactment of a plan and the court hastily held hearings on February 7 to chose among plans presented to it. At the hearing applicants presented three plans. Plan A or the Senate plan was S. 3564, approved by the New Jersey legislature but vetoed by the governor. Plan B was a minor variation on Plan A, which by breaking a single municipal boundary, and shifting one small block in Kearny from the 11th to the 10th district, reduced the overall

deviation from 67 to 42 people. The New Jersey Senate intervenor attempted to introduce a third variation (Plan C) which, by moving several municipalities in addition to the Kearny block, was able to reduce the overall deviation to 17 people. The district court refused to admit the plan as the adjustment had not been made prior to February 3. The court stated that it was not interested in further "fine tuning" to reduce the deviations in any of the submitted plans. Hearing Tr. 58-60 (quotation at 60). 2/

The Republican congressional delegation presented a plan not based at all on the enacted plan. Unlike all the plans discussed at the previous district court hearing, all plans that have passed the New Jersey legislature since 1970, and all the plans endorsed by the Governor, this plan -- the Forsythe plan -- broke municipal boundaries. By doing so it obtained an overall deviation of 25 people (0.004%). The average deviation of all the districts was 5.9 people, or 0.001%. Under the Forsythe plan 31.7% of the state's citizens (2,335,308 people) would be placed in districts different from those used in the last election. 3/

The district court, in reviewing the plans before it, stated that no deference needed to be given to the state-enacted plan because "[w]e owe no deference to an unconstitutional state statute." Opinion, J.S. App. 9a. The district

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2/ The plan as presented to the district court on February 7th had a deviation of 11 people. However, it was later discovered that it was not entirely contiguous because one municipality did not quite connect with the remainder of its district. On February 15, 1984, counsel for the State Senate intervenors wrote the Court, correcting the discontinuity in the plan. The correction changed the absolute deviation to 17 people.

3/ In addition to the plans discussed above, four other plans were before the district court, two submitted by the Governor and two by an intervening group named Taxpayers Political Action Committee. Those plans are described in the district court's opinion, J.S. App. 6a-7a (Taxpayers Committee), 10a-11a (Governor's plan). The Taxpayers Committee plans had deviations larger than those in the state statute. The Governor's plans had deviations of 67 and 60.

court also stated "finally, the opinion of the court in Karcher v. Daggett, while declining to rely as a constitutional violation on the obviously partisan purposes behind the [State statute] recognizes that '[a] federal principle of population equality does not prevent any State from taking steps to inhibit gerrymandering so long as a good faith effort is made to achieve population equality as well.'" Opinion, J.S. App. 6a. The court went on to say that since the Supreme Court had considered "what interests may be taken into account by state legislatures in justifying deviations from the ideal of district population equality" that it, as a court, could take those same factors into account in evaluating the several plans. Id. The court, incorrectly assuming that it had as much discretion as the Legislature, then chose the Forsythe plan, concluding that it achieved smaller population deviations and created of more compact districts, and that its only disadvantage was in splitting two North Jersey municipalities. The court held "that this disadvantage is outweighed by the advantages of compactness and population near uniformity". Opinion, J.S. App. 12a. The court rejected S. 3564 (Plan A) and the other variations on the state statute, stating that any deference to the plan enacted by legislature of New Jersey would result in a plan containing "an obvious absence of compactness" and (without explaining its standards or referring to any evidence in support of its conclusion) "an intentional gerrymander in favor of certain democratic representatives". Opinion, J.S. App. 8a.

Applicants sought a stay from the district court on March 7, 1984. To date, the district court has not acted on this application.

II. REASONS FOR ISSUING AN ORDER

An order is necessary because the district court has arrogated to itself the functions of the New Jersey legislature. Its action flouts White v. Weiser and Upham v. Seamon by decreeing that the future elections shall be in accord with a plan chosen precisely because it does not conform to the statute enacted by the State of New Jersey.

New Jersey candidates for the United States House of Representatives are required to file petitions, containing 200 signatures, by April 26, 1984. If the full Court cannot act on our Jurisdictional Statement and resolve this question by April 13, we ask for an order so that the next election will not be held under a redistricting plan bearing no relation to the plan enacted by the state of New Jersey or the corrected plan adopted by both houses of the New Jersey legislature, and severely changing the districts used in the last election. We ask that the order direct the next congressional election to take place under Plan A, which corrected the population deviations of the enacted plan bringing them down to 67 people, one of the lowest population deviations in the nation, without violating a single municipal boundary.

A. The district court's rejection of the Senate plan and adoption of a plan because it does not resemble the plan adopted by the New Jersey Legislature is an unlawful intrusion of the judiciary into the legislative function, which raises substantial questions on appeal.

The Separation of Powers requires that the judiciary involve itself in reapportionment issues only to the extent necessary to assure a constitutional reapportionment. A court should not substitute its judgment, esthetics, or politics for that of a state legislature except to the extent absolutely required to assure obedience to the Constitution. The Court has never strayed from that principle. The Court has recognized that the powers of a district court to modify an unconstitutional state plan "are limited to those necessary to cure any constitutional or statutory defect." Upham v. Seamon, 456 U.S. 37, 43 (1982). Hence the district court's task was simply to cure the constitutional defects found in P.L. 1982, c.1, not to reshape districts or make policy judgments about the virtues of compact districts or divisions of municipal boundaries. As the Court has previously noted:

> From the beginning, we have recognized that "reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." Reynolds v. Sims, 377 U.S. 533, 586 (1964).... In fashioning a reapportionment plan or choosing among plans, a district court should not preempt the legislative task nor "intrude upon state policy any more than necessary." Whitcomb v. Chavis, supra, at 160.

White v. Weiser, 412 U.S. 783, 795 (1973) (some citations omitted).

These principles were clarified -- and the passage above quoted in full -- as recently as 1982 in Upham v. Seamon, supra. In that case the District Court found that the lines drawn for two districts in the Texas legislature's plan were unconstitutional. It proceeded, however, to order the use of a plan that redrew the lines not only of those districts but of other districts as well.

The Supreme Court reversed -- unanimously and without hearing oral argument. The Court read White v. Weiser as holding that a district court errs "when, in choosing between two possible court-ordered plans, it fail[s] to choose that plan which most closely approximate[s] the state-proposed plan." 456 U.S., at 42.

Thus, the fact that the Court declares a state reapportionment statute unconstitutional does not give a district court on remand a license to ignore the statute and fashion a new reapportionment to its own tastes and preferences. The unconstitutional features are to be corrected. The state statute is otherwise to be preserved.

The district court -- by its own admission -- has not done this. Referring to the last enacted statute it held "[w]e owe no deference to an unconstitutional state statute." (Opinion, J.S. App. 9a). The district court appears to treat Karcher v. Daggett as having held the state statute unconstitutional on gerrymander grounds, (see

Opinion, J.S. App. 9a,) which of course this Court did not do. Ignoring the state statute, the district court approved a plan not based on any plan enacted by the State or approved either by the Governor or either House of the Legislature. The court simply substitutes its own judgment for that of the legislature. For instance, the court says (Opinion, J.S. App. 12a):

> The two great advantages of the Forsythe plan, over any of the others, are the achievement of smaller population deviations, and the creation of more compact districts. The only disadvantage which the plan presents is the splitting of two North Jersey municipalities in order to achieve those advantages. We hold that this disadvantage is outweighed by the advantages of compactness and population near uniformity. [Emphasis added.]

The district court thus substituted its view on dividing municipalities for that of the State. The State's own plan divided no municipalities. Neither did the plans proposed by the Governor. Neither did the Senate plan (Plan A) enacted by both houses. Indeed, in discussing that plan the Senate Report stated that

> ..no consideration be given to dividing any municipality in order to reduce further the plan's infinitesimal deviations (assuming that is possible), because to do so would be worse than the imperceptible "inequality".... To divide municipal lines anywhere in the State would cause confusion and administrative nightmares with regard to running congressional elections.

Senate Report at 2. As Senator Lynch noted in his introduction of the bill, "The municipality is the basic unit through which the election process is held in New Jersey is held." Plan A achieves the lowest population deviation consistent with preservation of municipal lines.

Since Plan A, the Senate plan, more than corrected the population inequalities noted by this Court and did so without splitting municipalities, the district court under White and Upham was not free to adopt a radically different plan.

B. The forthcoming election of representatives should not be held under the Forsythe plan.

Contestants for the House of Representatives from New Jersey must qualify by April 26, 1984 by presenting a petition containing 200 voters' signatures from the district in which they will run. The primary elections are to be held June 6.

In the last election the districts used were those of the enacted plan. The elected representatives since that time have represented and served the needs of the people in those districts. The status quo is thus the enacted plan. The Senate plan corrects the deficiencies in that plan with the least dislocation of districts and with no division of municipal lines. An election under that plan therefore poses little administrative problem or dislocation of representation.

The Forsythe plan, adopted by the district court is radically different. To begin with, it divides municipalities, threatening "administrative nightmares" in the printing of ballots and operation of polling places. Second, it requires a massive dislocation of present districts. 31.7% of the population of the State -- 2,335,308 people -- would have to be moved from one district to another.

If we have demonstrated a substantial probability that the district court improperly rejected Plan A, which was closest to the enacted plan and fully corrected that plan's sole constitutional defect, then the next election should not proceed under a totally different plan. This would create massive confusion, compounded two years later in changing back to a plan based on the enacted plan. On the other hand, an election under the enacted plan, as corrected to end population inequality -- Plan A -- creates no such confusion. With transfers of less than 10% of the people from one district to another, with no split districts, elections can be held under conditions of numerical equality required by this Court. If the Court does not rule in our favor, then

the major change ordered by the district court could be made in an orderly way, rather than in haste.

Such an order is well within the authority of a Justice of this Court. Under Rule 44 a stay or injunction "may be granted by any Justice in a case where it might be granted by the Court." In McCarthy v. Briscoe, 429 U.S. 1317 (1976) (Powell, J.), the district court had declared Texas' refusal to put McCarthy on the ballot unconstitutional, but denied injunctive relief on the ground of laches. The court of appeals refused emergency relief. Justice Powell ordered the defendant to place McCarthy's name on the ballot. (The order notes that he polled the rest of the Court and that a majority would have done the same thing.) Similarly in Williams v. Rhodes, 21 L.Ed.2d 69 (1968) (Stewart, J.), Justice Stewart granted a temporary injunction, ordered names placed on ballots, and set (by consultation with the Court) an expedited schedule for briefing and argument.

III. CONCLUSION

If the full Court does not take final action to resolve this case by April 16, 1984, an order should be entered directing that the upcoming primary and congressional elections in New Jersey be held under Plan A presented to the district court. If the absolute minimum of deviation without regard to municipal boundaries, the order should direct the implementation of Plan B or Plan C, both of which are similar to Plan A but lower the maximum deviation to 42 and 17 people, respectively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 1984, I caused a copy of the foregoing Application for an Order to be mailed by express mail, postage prepaid to each of the other parties in this case at the addresses below. I further certify that all parties required to be served have been served.

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NO. 83-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALAN J. KARCHER, Speaker,
New Jersey Assembly, *et al.*,

Appellants,

vs.

GEORGE T. DAGGETT, *et al.*,

Appellees.

On Appeal From the United States District Court for the District of New Jersey

MOTION OF APPELLEES EDWIN B. FORSYTHE, *ET AL.* TO AFFIRM

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Questions Presented

1. Whether the present appeal from the three-judge District Court's unanimous exercise of its remedial discretion to adopt the proposed congressional redistricting plan the "Forsythe Plan" which achieved the greatest population equality of all of the plans in evidence before it, in compliance with the mandate of *Karcher* v. *Daggett*, is so unsubstantial as not to need further argument.

2. Whether appellants' failure to produce evidence in the District Court to demonstrate that any specific state policy bore a causal relationship to the nearly-threefold increase in population inequality created by the "Senate Plan," and therefore "justified" the increased population deviation of that plan, renders their appeal from the three-judge District Court's unanimous finding that the increased deviation was not justified so unsubstantial as not to need further argument.

TABLE OF CONTENTS

PAGE

Table of Authorities

Cases

Constitutional Provisions

Statute

Rule

NO. 83-1526

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Appellees.

On Appeal From the United States District Court for the District of New Jersey

MOTION OF APPELLEES EDWIN B. FORSYTHE,[1] *ET AL.* TO AFFIRM

[1] The Honorable Edwin B. Forsythe, M.C. died on March 29, 1984. This motion will continue to refer to appellees Forsythe, *et al.*, who now include only Congressman Matthew J. Rinaldo, Congresswoman Margaret S. Roukema, Congressman Christopher H. Smith and the other New Jersey citizens who were plaintiffs in the District Court with the exception of George Daggett. Mr. Daggett has represented himself throughout this action. Congressman James A. Courter is also separately represented.

Appellees Edwin B. Forsythe, *et al.* respectfully move this Court, pursuant to Rule 16.1(c), to affirm the unanimous judgment of the three-judge United States District Court for the District of New Jersey, which adopted the congressional redistricting plan with the greatest population equality of all the proposed plans in evidence, on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Constitutional Provision Involved

Article I, Section 2 of the Constitution of the United States is set forth at pages 2-3 of the Jurisdictional Statement. [hereinafter "J.S.——"]

Statement of the Case

Appellants - - - the Democrat Speaker of the Democrat-controlled New Jersey Assembly, the Democrat President of the Democrat-controlled New Jersey Senate, and seven of the nine Democrat incumbent Members of Congress from New Jersey - - - appeal from the unanimous opinion and judgment of the three-judge United States District Court for the District of New Jersey (Gibbons, C.J., Fisher, Chief D.J. and Brotman, D.J.). The District Court, in the exercise of its remedial discretion as a result of New Jersey's failure to enact a congressional redistricting statute to replace the law declared unconstitutional by this Court in *Karcher* v. *Daggett*, 462 U.S. ——, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), adopted the proposed plan which created the smallest population deviation from precise mathematical equality of any of the proposed redistricting plans before it. (J.S. 1a-34a)

The early procedural history of this action is set forth in detail in Section I of this Court's opinion in *Karcher* v. *Daggett, supra,* 77 L.Ed.2d at 138-140. On June 22, 1983, this Court affirmed the judgment of the three-judge District Court that New Jersey P.L. 1982, c.1 was unconstitutional because it created congressional districts with a degree of population inequality which was not unavoidable despite "a good-faith effort to achieve precise mathematical equality" and for which justification had not been shown, in violation of Article I, Section 2 of the Constitution.

After the filing of this Court's mandate, the District Court filed an Order on Mandate on December 19, 1983. (J.S. 31a) The Order formally declared P.L. 1982, c.1 unconstitutional, enjoined the state defendants from conducting any elections under P.L. 1982, c.1, and granted the New Jersey Legislature and Governor until February 3, 1984 "to enact a new constitutional plan for reapportionment." The District Court further directed in a letter to counsel that all parties submit no later than February 3, 1984 any redistricting plans which they desired the District Court to consider in the event that the Legislature and Governor failed to enact a new constitutional plan by February 3rd. Finally, the Court's December 19, 1983 Order set the matter down for further proceedings on February 7, 1984 if the state had not met the February 3rd deadline.

New Jersey failed to enact any new plan by February 3, 1984, and indeed has enacted no plan to this day. Although the Democrat-dominated Assembly and Senate passed a purportedly "new" plan (known variously as the "Brown-Lynch Plan" and the "Senate Plan"), that bill was vetoed by the Governor because it retained both unjustified population inequality and the gross gerryman-

dering of P.L. 1982, c.1. The Legislature made no attempt to override the veto.

Accordingly, the three-judge District Court convened a hearing on February 7, 1984 to choose a remedy for the constitutional violation left uncorrected by the failure of the New Jersey legislative process. At the hearing, all parties agreed that the Court should select a redistricting plan from among the proposed plans placed in evidence.

The District Court considered a number of redistricting proposals introduced in evidence by various parties and others. On February 17, 1984, the Court filed an opinion unanimously adopting the plan proposed by the Forsythe appellees ("the Forsythe Plan") because it was the plan which achieved the greatest population equality of all of the plans admitted into evidence at the hearing. (J.S. 12a) The Court noted that in contrast to the "Senate Plan" propounded by appellants, the Forsythe Plan created districts which were significantly more compact than those which would result from any of the other plans. In addition, the Court observed that the Forsythe Plan preserved minority voting power and noted the absence of any evidence from which it could find that the Forsythe Plan was "designed to achieve partisan advantage." (*Id.*) The Court made the unanimous finding of fact that the Democrats' Senate Plan, by contrast, was designed "to deviate from the norm of population equality for the patently discernable purpose of partisan advantage." (J.S. 8a-9a).

Appellants filed a Notice of Appeal from the District Court's judgment, and moved in this Court for a "stay" of that judgment pending appeal and for an expedited appellate schedule. In fact, the "stay" application was actually a motion for an injunction summarily reversing the District Court and requiring the implementation of

the Senate Plan instead of the Forsythe Plan. This Court denied that application on March 30, 1984, and denied the motion to expedite the appellate schedule on April 2, 1984. *Karcher* v. *Daggett*, No. A-740 (83-1526), Mar. 30 and April 2, 1984.

ARGUMENT

I. The three-judge District Court unanimously adopted the Forsythe Plan—the plan with the greatest population equality of all of the proposed plans before the Court—in the sound exercise of its remedial discretion under *Karcher* v. *Daggett*.

In *Karcher* v. *Daggett, supra*, this Court reaffirmed the primacy of precise population equality in the constitutional analysis of congressional redistricting plans under Article I, Section 2:

> We thus reaffirm that there are no de minimis population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification.

Karcher v. *Daggett, supra*, 77 L.Ed.2d at 143. The Court's opinion reiterated the two-part test of *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), to govern the analysis of congressional redistricting statutes:

> Thus two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. ***First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population.*** Parties challenging apportion-

> ment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. *If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.*

77 L.Ed.2d at 140-141 (emphasis added; citations and footnote omitted).

A. The Forsythe Plan was the only plan before the District Court which achieved precise mathematical equality as nearly as was practicable.

Application of the *Karcher* test to appellants' "Senate Plan," as compared with the Forsythe Plan, reveals that the very existence of the Forsythe Plan was sufficient to carry appellees' burden under the first prong of the *Karcher* test. Since the maximum population variation of the Senate Plan was 67 people, while the maximum variation of the Forsythe Plan adopted by the District Court was only 25 people, there can be no question that the population differences created by the Senate Plan "could have been reduced . . . by a good faith effort to draw districts of equal population." 77 L.Ed.2d at 141. The Court's opinion in *Karcher* established firmly that "there are *no* de minimis population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification," 77 L.Ed.2d at 143 (emphasis added), and therefore the District Court's consideration of the relative merits of the two plans properly shifted to the second *Karcher* inquiry— whether the Sen-

ate Plan's proponents had sustained their burden of proving that this 168% increase in population inequality "was necessary to achieve some legitimate goal." 77 L.Ed.2d at 141.

B. Appellants failed to sustain their burden of specifically justifying the Senate Plan's deviation.

The only policy which appellants have ever claimed that the Senate Plan effectuates more completely than the Forsythe Plan - - - other than a policy favoring the election of Democrats over Republicans - - - is the alleged state policy against dividing municipalities between congressional districts. It should be noted that appellants never proved that such a state policy exists, other than noting that the unconstitutional P.L. 1982, c.1 divided no municipalities. Nevertheless, they urged the District Court to adopt the Senate Plan because it split no municipalities, while the Forsythe Plan achieved superior population equality but divided two of New Jersey's 567 municipalities.

This Court cautioned in *Karcher,* however, that "general assertions" of state interests which purportedly justify population deviations are insufficient:

> The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions.

77 L.Ed.2d at 147. As in *Karcher,* where both the District Court and this Court rejected the purported justification of preserving minority voting power in the Tenth District because appellants had demonstrated no causal relationship between the specific deviations in other dis-

tricts and that asserted goal, the record is barren of such a specific showing here.

Under the proposed Senate Plan, the smallest districts would be the Tenth (-52 from the ideal) and the Third (-11). The largest districts would be the Ninth (+15), the First (+12) and the Fifth (+12). *Compare* 77 L.Ed.2d at 149. Appellants have made no showing that the Senate Plan's refusal to split municipalities created these specific population deviations.

On the contrary, even when appellants abandoned this claimed important state policy by submitting their "Plan B," which was the Senate Plan changed only by the division of Kearny between the Tenth and Eleventh Districts, they still were unable to match the level of population equality achieved by the Forsythe Plan. This fact alone establishes that the inferiority of the Senate Plan, under the paramount criterion of precise population equality, was not the inevitable result of adherence to a claimed state policy of preserving municipal boundaries. Moreover, this Court specifically held in *Karcher* that "[p]reserving political subdivisions intact, however, while perfectly permissible as a secondary goal, is not a sufficient excuse for failing to achieve population equality without the specific showing" required by the second prong of the *Karcher* test. 77 L.Ed.2d at 142, n.5; *see* 77 L.Ed.2d at 147-149.

C. The District Court properly exercised its broad remedial discretion under *Karcher* v. *Daggett* and *White* v. *Weiser*.

The foregoing analysis demonstrates that, even had the Senate Plan been enacted by the Legislature and Governor, it would have failed both parts of the *Karcher*

test when compared with the superior population equality available under the Forsythe Plan. As the District Court pointed out, however, it was not necessary for it to consider at this remedy stage "how [the Senate Plan] would have fared had it been validly enacted by the State of New Jersey." (J.S. 7a; citations omitted) The District Court recognized, however, that *Karcher* does "provid[e] useful instruction to district courts faced, as we are, with selecting a districting plan because of a failure in the legislative process" and took into account the factors recognized as legitimate by this Court in *Karcher*: "making districts compact, preserving municipal boundaries, preserving cores of prior districts, avoiding contests between incumbents, and inhibiting gerrymandering." (J.S. 6a)

The Court continued:

> [The Senate Plan] is proposed to us as a remedy. As such it does not meet the criteria which we consider relevant to the exercise of our discretion in devising a remedy. First, it does not achieve as small an overall or mean deviation as other plans which are in evidence. While it does succeed in preserving municipal boundaries, the population variances it would maintain are not maintained for that purpose, but rather for the purpose of preserving, as nearly as possible, the districts erected in the Feldman Plan [P.L. 1982, c.1]. . . . The most glaring defects in the Feldman Plan, however, are carried forward in [the Senate Plan].
>
> These are an obvious absence of compactness, and an intentional gerrymander in favor of certain Democratic representatives.

(J.S. 7a-8a)

As they did in the District Court, appellants claim in this Court that *White* v. *Weiser*, 412 U.S. 783 (1973), required the adoption of the Senate Plan. Appellants misperceive *Weiser* both on the law and the facts.

Justice Stevens noted in his opinion concurring in this Court's denial of appellants' stay application that "[o]nce a constitutional violation has been found, a District Court has broad discretion to fashion an appropriate remedy. *E.g.*, *Milliken* v. *Bradley*, 433 U.S. 267, 280-288 (1977)." *Karcher* v. *Daggett*, No. A-740 (83-1526), Mar. 30, 1983 (concurring opinion of Stevens, J.). *Weiser* does not purport to limit the *necessary* exercise of that discretion, but prohibits divergence from expressed state policy only where such federal intervention is not necessary to vindicate a paramount federal constitutional principle:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, *whenever adherence to state policy does not detract from the requirements of the Federal Constitution*, we hold that a district court should *similarly* honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor "intrude upon state policy any more than necessary." Whitcomb v. Chavis, supra, [403 U.S. 124,] at 160.

White v. *Weiser*, *supra*, 412 U.S. at 795. (emphasis added)

In *Weiser*, the District Court ordered adoption of a redistricting plan which *neither* adhered to the state's

redistricting policies *nor* achieved the maximum practicable population equality, and this Court reversed:

> Plan B, as all parties concede, represented an attempt to adhere to the districting preferences of the state legislature while eliminating population variances. *Indeed, Plan B achieved the goal of population equality to a greater extent than did Plan C.* Despite the existence of Plan B, the District Court ordered implementation of Plan C . . . .

412 U.S. at 796. (emphasis added) This Court has never held, however, that the supreme federal constitutional criterion of precise mathematical equality, as nearly as is practicable, is to be sacrificed in favor of deference to state political considerations. *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964); *Kirkpatrick* v. *Preisler, supra*, 394 U.S. 526, 530-531 (1969). Yet that is the result appellants urge here.

This Court has reaffirmed in this very case that *no* increase in population equality among congressional districts is so small that it is to be disregarded or sacrificed on the altar of state political expediency. Justice Brennan spoke eloquently for the Court: "As between two standards— equality or something-less-than equality—only the former reflects the aspirations of Art. I, § 2." *Karcher* v. *Daggett, supra*, 77 L.Ed.2d at 142.[2]

In summary, this Court specifically held in *Weiser* that "the District Court should defer to state policy in fashioning relief only where that policy is consistent with con-

---

[2] Because the plan adopted by the District Court achieves greater population equality than any other plan before that Court, this Court need not accept appellants' invitation to decide the issue of gerrymandering in order to affirm the District Court.

stitutional norms and is not itself vulnerable to legal challenge." 412 U.S. at 797; *see* J.S. 8a. Appellants have failed to demonstrate that any particular state policy or policies caused the Senate Plan's higher deviation and therefore have failed to justify that deviation under *Karcher*. The District Court was well within its remedial power in adopting the plan which achieved the higest degree of population equality of all the proposals before it.

Accordingly, the judgment of the District Court presents no substantial constitutional issues requiring further briefing and argument, and therefore should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of New Jersey should be affirmed.

Respectfully submitted,

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Dated: April 13, 1984

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NO. A-740 (83-1526)

IN THE

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On Appeal from the United States District Court for the District of New Jersey

MOTION OF APPELLEES THOMAS H. KEAN, GOVERNOR OF THE STATE OF NEW JERSEY, AND JANE BURGIO, SECRETARY OF STATE, TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

PAGE

Table of Authorities

Cases Cited

United States Constitution Cited

Statute Cited

New Jersey Session Law Cited

PAGE

Court Rules Cited

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Appellees, Governor of New Jersey and Secretary of State, respectfully move to dismiss this appeal or to affirm the judgment of the United States District Court for the District of New Jersey pursuant to Rule 16(1)(b) on the grounds that the appeal does not present a substantial federal question and, pursuant to Rule 16(1)(c) and (d), on the grounds that this appeal does not raise

any issues of special importance and that the judgment below is totally consistent with federal precedent and is so obviously correct as to warrant no further review by this Court.

Constitutional and Statutory Provisions Involved

This appeal involves Article 1, §2 of the United States Constitution, which provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and has been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years, in such Manner as they shall by Law direct. The Number of Representative shall not exceed one for every thirty Thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the

> State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.
>
> When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.
>
> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

This case also involves the prior New Jersey reapportionment statute, L. 1982, c. 1, commonly known as the Feldman Plan, which was previously held unconstitutional by this Court. That statute is set forth as an appendix to the District Court's original opinion. See *Daggett* v. *Kimmelman*, 535 F. Supp. 978, 985-87 (D.N.J. 1982), aff'd —— U.S. ——, 103 S.Ct. 2653 (1983).

Counter-Statement of the Case

This is an appeal from a decision of a three-judge district court which ordered the implementation of a congressional redistricting plan for New Jersey following the failure of the State to enact a new redistricting plan in accordance with the population figures set forth in the 1980 census. The prior New Jersey reapportionment statute enacted following the census, L. 1982, c. 1, had been declared unconstitutional in an earlier decision of the three-judge court on the ground that, under *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), the range of population between the most and least populated districts of 3,674

people, or a relative overall range* of 0.6984%, violated the constitutional requirement of equality of population among districts. *Daggett* v. *Kimmelman*, 535 F. Supp. 978, 985-87 (D.N.J. 1982). By order of Justice Brennen, the District Court's order was stayed and the 1982 congressional elections were held under the districts established by the existing New Jersey statute. In a decision rendered June 22, 1983, this Court affirmed the decision of the District Court that the redistricting plan "was not the product of a good-faith effort to achieve population equality," and concluded that the Feldman Plan was invalid since a lower population deviation could have been accomplished by selecting one of the alternative plans before the Legislature. *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653, 2663-65 (1983).

Pursuant to this Court's decision, on remand the District Court on December 19, 1983 entered an Order on Mandate declaring L. 1982, c. 1 unconstitutional and providing that, in the event that the Legislature and the Governor did not adopt a new congressional redistricting plan by February 3, 1984, the court would convene on February 7, 1984 to undertake further proceedings. Appellants' Appendix B at 31a to 32a.** The Court further ordered that witness lists be exchanged by January 31, 1984 and that those witnesses be held available for deposition from January 31, 1984 through February 6, 1984, *ibid.*, and

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* "Relative overall range" refers to the difference between the least and most populated districts expressed as a percentage of the ideal average district population. The ideal average district population is determined by dividing the population of the State according to the 1980 census by 14, the number of congressional districts to which it is entitled.

** As used herein, "Appellants' Appendix" refers to the Appendix filed by Appellants with their Jurisdictional Statement.

orally directed that any congressional redistricting plans proposed by the parties be submitted to the court by February 3, 1984.

When the New Jersey Legislature and Governor did not enact a new redistricting plan by February 3, 1984, the court held a hearing on February 7, 1984 to consider the plans submitted by the parties by the February 3, 1984 deadline. Among the plans presented, Appellees Forsythe, *et al.*, submitted a plan that had an overall deviation among districts of only 25 persons, for a relative overall range of 0.00475%. Opinion, Appellants' Appendix A at 12a. Appellants Alan J. Karcher, *et al.*, submitted two plans based upon L. 1982, c. 1, the statute previously declared unconstitutional by this Court, which slightly modified the earlier plan to obtain a lower population deviation among districts. The first plan, designated "Plan A," proposed the adoption of a bill introduced in the current session of the Legislature as Senate Bill 3564, which had a maximum deviation of 67 persons for a relative overall range of 0.01273%. The second plan, designated "Plan B," was a further modification of Plan A which divided a single municipality to accomplish a maximum deviation among districts of 42 persons.*

In an opinion and order issued on February 17, 1984, the District Court adopted the Forsythe Plan on the ground that, since it "achieves the lowest population devia-

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* Since appellants' Plan C was not presented to the court by the February 3, 1984 deadline, the court declined to consider it when it was presented for the first time at the February 7, 1984 hearing. The Plan C referred to in Appellants' Jurisdictional Statement is actually a modification of the Plan C the court declined to consider when presented on February 7. On February 16, 1984, Appellants advised the court that the earlier version of Plan C did not have completely contiguous districts and submitted the modified version.

tion of any plan which has been presented," it best fulfilled the constitutional requirement of attaining the lowest possible population deviation among districts. Opinion, Appellants' Appendix A at 12a. The court also concluded that the plan furthered the applicable non-constitutional criteria since it did not place any incumbents in the same district, preserved a Black majority in the Tenth District, was not designed to achieve partisan advantage and created compact districts. *Ibid.* In reaching this decision, the court determined that the two plans proposed by Appellants were an inappropriate basis for a remedy since those plans contained a greater population deviation than the Forsythe Plan, and established districts which were not compact and which had only a remote relationship to the districts established pursuant to the two prior decennial censuses. *Id.* at 7a to 8a. The District Court further concluded that the two plans were not entitled to deference under this Court's decision in *White* v. *Weiser*, 412 U.S. 783 (1973), because Appellants had not demonstrated that the Feldman Plan upon which they were based served any legitimate state policy objectives, and concluded that it was instead designed to serve "the patently discernable purpose of partisan advantage." Opinion, Appellants' Appendix A at 8a to 13a.

On March 2, 1984, Appellants Karcher, *et al.*, filed a Notice of Appeal to the Supreme Court of the United States and thereafter moved before the District Court for a stay of its February 17, 1984 order, and requested that the court summarily issue an injunction ordering the implementation of their Plan A or B for purposes of the 1984 New Jersey congressional elections. Appellants' application was denied by the three-judge panel by order filed March 14, 1984, and Appellants subsequently made the same application for stay and summary injunction to Associate Justice William Brennen, sitting as Circuit Jus-

tice. At the same time, Appellants filed their Jurisdictional Statement together with a motion for accelerated consideration of their appeal.

The request for the stay and injunction was referred to the full Court, and was denied by an order entered March 30, 1984. In addition, the motion for accelerated consideration of the appeal was denied by the Court by order entered April 2, 1984. Appellees Thomas H. Kean, Governor of New Jersey, and Jane Burgio, Secretary of State, now file this motion for dismissal of the appeal or, alternatively, summary affirmance of the decision below.

ARGUMENT

The decision of the District Court, which adopted the congressional redistricting plan submitted by Appellees Forsythe, *et al.*, and rejected Appellants' plans, should be affirmed since it is plainly correct or the present appeal should be dismissed because it fails to raise a substantial federal issue, does not present an issue of broad importance and the decision below does not conflict with federal precedent.

In this case, Appellants contend that the District Court failed to follow established precedent in ordering the implementation of the congressional districts proposed by the Forsythe Plan. Specifically, they allege that the court below was without discretion to choose any plan other than one based upon L. 1982, c. 1, the prior unconstitutional statute, so long as the population deviation in such plan was at a constitutionally acceptable level. See Jurisdictional Statement at 10 to 13. However, consideration of the prior decisions of this Court and the record below unequivocally demonstrate that this argument is without

basis in the law and that the District Court clearly did not abuse its discretion in failing to order implementation of one of the plans proposed by Appellants.

This Court has recognized that when a district court addresses the weighty but "unwelcomed obligation" of establishing congressional districts as a result of a state's failure to do so, the court is "faced with hard remedial problems in minimizing friction between [its] remedies and legitimate state policies." *Connor* v. *Finch,* 431 U.S. 407, 414-15 (1977). Moreover, since the primary authority for establishing congressional districting plans resides with the states, the District Court's sensitive endeavor "must be accomplished circumspectly, and in a manner 'free from any taint of arbitrariness or discrimination.'" *Id.* at 415, quoting *Roman* v. *Sincock,* 377 U.S. 695, 710 (1964). This Court has further admonished District Courts to approach this task with an awarness that the ultimate objective of the redistricting process is to ensure the "full and effective participation in the political process" of "each and every citizen," since congressional representation pursuant to the plan the court adopts affects the essence of our system of self government. *Whitcomb* v. *Chavis,* 403 U.S. 124, 141 (1971), quoting *Reynolds* v. *Sims,* 377 U.S. 533, 565 (1964).

Moreover, this Court has consistently emphasized that a court-adopted reapportionment plan "will be held to stricter standards" than one adopted by a state legislature since a federal court is "lacking the political authoritativeness that the legislature can bring to the task." *Connor* v. *Finch, supra,* 431 U.S. at 414-15; accord *Wise* v. *Lipscomb,* 437 U.S. 535, 541 (1978). Accordingly, the court below was required not only to satisfy itself that the plan it adopted met the preeminent constitutional requirement of containing a constitutionally acceptable popula-

tion deviation among districts, *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2658, but also that the plan was "based on legitimate considerations incident to the effectuation of a rational state policy." *Connor* v. *Finch, supra,* 431 U.S. at 418, quoting *Reynolds* v. *Sims,* 377 U.S. 533, 579 (1964).

In this case, Appellants challenge the validity of the selection of the Forsythe Plan solely on the basis of their contention that the District Court was required to mechanically adopt one of their plans once it concluded that those proposals most nearly approximated L. 1982, c. 1, the prior legislation enactment. However, this contention ignores the fact that the lower court could reasonably have determined that it was precluded from adopting Appellants' Plan A or B since the Forsythe proposal more effectively remedied the constitutional violation which resulted in the invalidation of the prior plan.

In its earlier decision in this case, the Court reiterated that the requirement of "equal representation for equal numbers of people" implicit in Article I, §2 of the United States Constitution permits only those differences in the population of congressional districts which are "unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown," and that there is no *de minimis* level of deviation from "[p]recise mathematical equality" which is constituionally permissible. *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2658-60, quoting *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 535 (1969). The only justification offered by Appellants for the level of population deviation contained in their plans was the desire to retain the shapes of the districts established by the earlier unconstitutional plan. Under this Court's prior decisions, the lower court could therefore defer to those plans only if the shapes of their districts, as originally embodied in the Feldman

Plan, furthered neutral state policy objectives sufficiently to justify the population deviation in Appellants' proposals as a "good-faith effort to achieve absolute equality. . . ." *Ibid.*

This analysis is also required under this Court's decision in *White* v. *Weiser, supra,* which held that consideration of a remedial reapportionment proposal based upon a prior statute must begin with consideration of the public policy objectives sought to be furthered by the earlier statute. In *Weiser,* the Court reviewed a determination of a three-judge panel which selected a particular congressional reapportionment plan "solely on the basis of population considerations," notwithstanding the fact that another proposal "achieved the goal of population equality to a greater extent" and "most clearly approximated the reapportionment plan of the state legislature." That plan had previously been declared unconstitutional on the basis of population deviations, and was specifically designed "to preserve the constituencies of congressional incumbents" and to avoid contests between them. 412 U.S. at 791, 796. Noting that the formulation of districts in a manner which minimized contests between incumbents was a valid state policy, 412 U.S. at 797, quoting *Burns* v. *Richardson,* 384 U.S. 73, 89 n.16 (1966), the Court held that "the District Court erred in so broadly brushing aside state apportionment policies without solid constitutional or equitable grounds for doing so." 412 U.S. at 797, quoting *Whitcomb* v. *Chavis,* 403 U.S. 124, 161 (1971). The Court accordingly concluded that the three-judge panel abused its discretion in failing to defer to the legitimate state legislative policy objectives reflected in the proposed plan, as a minor reformulation of the prior enactment, without specifically setting forth any "good reason[s]" for failing to do so. 412 U.S. at 796-97.

Thus, contrary to Appellants' contention, *White* v. *Weiser* does not mandate mechanical obeisance to the prior unconstitutional reapportionment statute but instead, as with the inquiry whether the population deviation figures contained in the proposed plans may be considered to be "justified," requires that the lower court focus its attention on the policy objectives sought to be furthered by the prior statute. Indeed, there is nothing in *Weiser* to suggest that the mere existence of a prior statutory plan creates, in effect, an irrebuttable presumption that it was intended to further valid state objectives. Such a wooden interpretation would be inconsistent with the broader principle of comity, of which the Court's decision in *Weiser* is but one expression, that it is only *valid* state policies which should be accorded deference whenever consistent with federal constitutional and statutory standards.

In applying this holding, the lower federal courts have therefore recognized that it is "only to the extent that the [proposed] plan *demonstrates* a legitimate state policy that it enjoys that privileged review which might have been presumptively accorded its predecessor," *Graves* v. *Barnes,* 446 F. Supp. 560, 564 (W.D. Tex. 1977), aff'd *sub nom. Briscoe* v. *Escalante,* 435 U.S. 901 (1978) (emphasis in original), and that the court may adopt a plan as a remedy only if the statute upon which it is based represents "a genuine effort, untainted by any suspect or invidious motives." *Doulin* v. *White,* 535 F. Supp. 450, 453 (E.D. Ark. 1982); accord *Terrazas* v. *Clements,* 537 F. Supp. 514, 528, 537 (W.D. Tex. 1982). Furthermore, the specific holding of *Weiser* that the lower court should have deferred to a plan based on statute designed to avoid contests between incumbents also required the District Court to decline to accord Appellants' proposals any special deference since, as discussed below, it was established that the Feldman Plan was deliberately crafted to

maximize the number of election contests between incumbent Republican congresspersons.

The standard articulated in *White* v. *Weiser* was not altered by this Court's *per curiam* decision in *Upham* v. *Seamon*, 456 U.S. 37, 102 S.Ct. 1518 (1982). Appellants rely on this case for the proposition that the plan adopted by the lower court could not depart from the prior unconstitutional reapportionment statute in the absence of a finding that other statutory or constitutional violations were implicated by the Feldman Plan. Jurisdictional Statement at 10. *Upham* involved a challenge to a congressional reapportionment statute under the Voting Rights Act ("VRA"), 42 U.S.C. §1973c, on the ground that it was legally unenforceable because the United States Attorney General had failed to certify compliance with the VRA as to two specific districts in the reapportionment plan. 456 U.S. at ——, 102 S.Ct. at 1519; *Seamon* v. *Upham*, 536 F. Supp. 931 (E.D. Tex. 1982), vacated and remanded 456 U.S. 37, 102 S.Ct. 1518 (1982). Since the VRA provides that the merits of an Attorney General objection may only be adjudicated in a declaratory judgment action in the United States District Court for the District of Columbia, prior decisions of this Court have held that the authority of district courts in other jurisdictions under the VRA is limited to determining whether the proposed change in election practices is covered by the statute and has been approved by the Attorney General, entering an injunction barring implementation of the practice if it has not been approved and, in reapportionment cases, providing for an interim redistricting plan. *Perkens* v. *Matthews*, 400 U.S. 379, 383-87 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544, 558-60 (1969).

The District Court in *Upham*, however, concluded that a failure to obtain "preclearance" as to the two districts rendered the entire plan a nullity, and therefore altered

the composition of districts not objected to by the Attorney General in formulating an interim reapportionment plan in order to render those districts more racially "fair." 456 U.S. at ——, 102 S.Ct. at 1519-20. In reversing the lower court's decision, this Court held that, in adopting an interim reapportionment plan to replace one rendered legally unenforceable as a result of an Attorney General objection to certain districts, the District Court could alter only the particular districts objected to by the Attorney General, absent a finding that composition of the remaining districts violated the VRA, the Constitution or relevant statutory provisions. 456 U.S. at ——, 102 at 1521-22.

Upham thus stands for a principle no broader than that an interim plan adopted by a District Court under the VRA may only reformulate those districts objected to by the Attorney General. This principle is consistent with the holdings of *Matthews* and *Allen* that, in essence, the District Court's jurisdiction in entering interim relief under the VRA extends no further than required to enforce the action of the Attorney General in failing to preclear the particular plan. See *Dotson* v. *City of Indianola*, 521 F. Supp. 934, 942-43 (W.D. Miss. 1981), aff'd 456 U.S. 1002 (1982). Moreover, the District Courts which have applied *Seamon* have recognized its narrow application to the formulation of interim plans under the VRA, and have noted that the decision does not limit the District Court's authority to fully review constitutional and other public policy questions raised by the parties incident to the subsequent formulation of a final redistricting plan. See, *e.g.*, *Burton* v. *Hobbie*, 543 F. Supp. 235, 239 (M.D. La. 1982), aff'd —— U.S. ——, 103 S.Ct. 286 (1982).

The District Court in this case therefore properly turned to the policy objectives of the Feldman Plan, both to determine whether the level of population deviations con-

tained in Appellants' proposals could be justified as a "good-faith effort to achieve absolute population equality," and to determine whether the statutory genesis of those plans entitled them to any deference under this Court's holding in *White* v. *Weiser*. Appellants presented no evidence whatsoever to either explain or justify the policy objectives of the Feldman Plan, and instead relied solely on the fact that their present proposals were virtually a "mirror image" of the Feldman Plan. Moreover, substantial evidence was presented by the other parties to demonstrate that the Feldman Plan served no identifiable neutral state policy objectives, and that it was instead designed solely to achieve invidiously discriminatory political objectives. The District Court therefore properly concluded that Appellants had failed to meet their burden of proof, under *White* v. *Weiser* and the Court's prior decision in this case, of showing that their proposals were entitled to deference or that the population figures in those plans were justified. The District Court accordingly did not abuse its discretion when it instead adopted the Forsythe Plan, which had the lowest population deviation figures of any plan submitted by the parties.

Unrebutted evidence was offered by the other parties which established that the shapes of the districts established by the Feldman Plan did not correspond with any known communities of interest or represent any effort to follow geographical, social or political boundaries. See Exhibit D-13 in Evidence, Deposition of Assemblyman Richard A. Zimmer (February 4, 1984) (hereafter referred to as "Zimmer"), at T40-2 to -7; Exhibit IF-2(E) in Evidence, Public Meeting of the Senate State Government, Federal and Interstate Relations and Veterans' Affairs Committee on Congressional Redistricting (December 8, 1983), at 829 (Statement of Senator Gerald Cardinale). Indeed, it has been noted by a Justice of this Court that

the quality of representation under the Feldman districts would of necessity suffer, since "the boundaries are so artificial that they are likely to confound the congressmen themselves." *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2690 (Powell, J., dissenting). As a result, in the absence of other neutral public policies furthered by the Feldman Plan, the District Court could properly have concluded that the congressional districts which it established represent "little more than crazy quilts completely lacking in rationality [which] could be [rejected by the court] on that basis alone." *Reynolds* v. *Sims,* 377 U.S. 533, 568 (1964) (footnote omitted).

Furthermore, a comprehensive record was developed in the District Court which established the invidiously partisan and politically discriminatory purpose of the Feldman Plan as a whole.* The legislative history accepted into evidence amply demonstrated this harshly partisan animus. See Exhibit D-11 in Evidence. An unabashed and detailed expression of this legislative purpose was, of course, previously presented to this Court in the August 28, 1981 letter from then-Speaker of the Assembly

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*In light of the copious testimonial, demonstrative and statistical evidence, as well as legislative history, presented by the State, Appellees and other parties at the hearing below, Appellants' assertion that not "a single scrap" or "shred of evidence" was presented to demonstrate the gerrymandering purpose of the Feldman Plan (see Jurisdictional Statement at 17, 19) is both inexplicable and wholly without foundation in the record. Moreover Appellants' further assertion that the affidavit of Dr. Thomas Mann presented by them "was the *only* expert whose evidence was presented by *any* party on the question of gerrymandering" (see Jurisdictional Statement at 19 n.16) similarly misrepresents the record since the deposition of Richard A. Zimmer offered by the State Appellees was specifically accepted by the court—over the objection of Appellants —as expert testimony on this issue. See Hearing Transcript at 18 to 26.

Christopher J. Jackman to Ernest C. Reock, Jr. *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2677; see *Daggett* v. *Kimmelman, supra,* 535 F. Supp. at 989-93.

The effectuation of this intent with a vengeance was made clear to the District Court in the testimonial, statistical and demonstrative evidence presented by the parties. As set forth in the testimony of Assemblyman Zimmer, and as documented by the election data introduced into evidence, the Feldman Plan commenced its attempt to minimize or cancel the legitimate electoral strength of the Republican Party with the addition to the Ninth District, theretofore represented by a Republican incumbent, of strongly Democratic municipalities and the simultaneous elimination of Republican strongholds, which were shifted into the already overwhelmingly Republican Fifth District. Zimmer at T38-3 to -10. Simultaneously, the Feldman Fifth District, which provided a "dumping ground" for Republican votes from the old Ninth District, was artfully crafted to include the hometowns of two Republican incumbents, thus requiring that they either run against one another in the ensuing election, move, or run for election outside of their districts of residence. See L. 1982, c. 1; Exhibit D-4 in Evidence. The brazen lack of subtlety with which this was accomplished is clear from the 'artificial appendage' of the Fifth District, which swoops down (inside the 'neck' of the 'swan') to encompass the hometown of incumbent Republican Congressman James Courter. *Ibid.*; Zimmer at T30-7 to -16 & T77-18 to T78-7; see *Daggett* v. *Kimmelman, supra,* 535 F. Supp. at 984 (Gibbons, C.J., dissenting); *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2677 n.37 (Stevens, J., concurring); *id.,* —— U.S. at ——, 103 S.Ct. at 2690 (Powell, J., dissenting).

Although, of course, at least two incumbent congresspersons would be forced to reside in the same congres-

sional district as a result of the reduction of the State's congressional delegation, the proponents of the Feldman Plan were not satisfied simply with the result that both of the unlucky incumbent congresspersons be Republicans, but instead placed an additional two Republican incumbents in the new Twelfth District. See L. 1982, c.1; Exhibit D-4 in Evidence; Zimmer at T30-17 to T31-6; *Daggett* v. *Kimmelman, supra,* 535 F. Supp. at 984 (Gibbons, C.J., dissenting); *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2677 n.33 (Stevens, J., concurring); *id.*, —— U.S. at ——, 103 S.Ct. at 2690 (Powell, J., dissenting). For good measure, the Feldman Plan also placed the hometown of the Republican incumbent from the old Fourth District in a district held by a Democratic incumbent, thereby removing the Republican candidate from his demonstrated constituency base and precipitating a further contest between incumbents. Zimmer at T31-25 to T32-5. This premeditated paring of six incumbent congresspersons, five from one party, is, of course, directly contrary to the legitimate policy of formulating reapportionment plans to avoid unnecessary contests between incumbents. *White* v. *Weiser, supra,* 412 U.S. at 791; *Burns* v. *Richardson,* 384 U.S. 73, 89 n.16 (1966).

However, the surgical precision with which the Feldman Plan was partisanly drafted is most apparent in the new Third District. Recognizing that the Democratic incumbent in that district was clearly threatened by the aspirations of a particular Republican State Assemblywoman, over whom the incumbent had prevailed in 1980 by barely 2,000 votes out of more than 200,000 cast, see Exhibit D-2 in Evidence, the drafters of the Feldman Plan took a straightforward approach to neutralizing the Republican upstart: they simply deleted her State legislative district, previously totally encompassed by the Third District, practically *in toto* from the new Third District,

while at the same time transferring the Assemblywoman's hometown to the new Seventh District. Zimmer at T32-10 to -20; T37-6 to -19; T80-3 to -9; Exhibit D-12 in Evidence. The apparent motivating factor behind this maneuver was to insure that, in order to compete in the Third District, the Assemblywoman would have to run outside of her district of residence with virtually none of her constituency base—a set of circumstances which would be severely disabling in any election. Zimmer at T37-16 to T38-2.

What remained of the shredded remnants of the State was left with the dubious distinction of being designated the new Seventh District, otherwise known as 'the fish-hook.' See Zimmer at T30-4; *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2676 (Stevens, J., concurring), citing 40 *Cong. Q.* at 1194-95 (1982). Comprising, in part, municipalities from the old Twelfth District, the new Seventh District appears to have been intended to create another 'open' Democratic district out of one which might otherwise elect a member of the other party on the basis of the enormous personal appeal of the Republican incumbent from the old Twelfth District who previously represented the area, and whose hometown was placed in another district. Zimmer at T31-12 to -31.

Thus, there was a substantial evidentiary basis upon which the District Court could conclude that the Feldman Plan was consciously designed as an attempt to preserve existing strongly-Democratic districts and solidify that Party's more marginal districts, while either neutralizing Republican incumbents through displacement from their constituencies, or relegating them to political oblivion through the pairing of Republican incumbents in the new Fifth and Twelfth Districts.

Appellants allege that the District Court was required to conclude that the Feldman Plan was never-

theless "fair" because 13 of 14 incumbents ultimately prevailed in the ensuing election. However, there was ample evidence presented to the court below to demonstrate that this result must be attributed not to any neutral virtues intrinsic to the Feldman Plan, but to the single-minded resourcefulness of the hard-pressed Republican incumbents. Critical to the partial failure of the plan's gerrymandering purpose was the fact that the highly popular Republican incumbent from the old Twelfth District decided to run outside his district of residence in the 'fishhook' Seventh District, where he ultimately prevailed in the 1982 election, thus thwarting the attempted 'balkanization' of Republican electoral strength in the Central and Northern parts of the State. Zimmer at T79-3 to -9. When the other Republican incumbent who had been 'paired' in the new Twelfth District decided to run for the United States Senate, the Republican incumbent from the old Thirteenth District, who had been placed with another Republican incumbent in the new Fifth District, was free to move to the Twelfth District, where he subsequently won election, without the prospect of facing a Republican primary opponent. *Id.* at T78-18 to -21.

With the premise of the Feldman Plan's attempted gerrymander thus dislodged, the 'dominos' continued to fall in an unanticipated direction with the election of the sole Republican incumbent thus left in the Fifth District. Zimmer at T79-3 to -9. Moreover, the involuntary 'prodigal son' of the old Fourth District returned to his constituency to an electoral victory which must have similarly confounded the architects of the Feldman Plan. Although the Feldman Plan did successfully facilitate the vanquishment of the Republican incumbent in the Ninth District and the eclipse of the congressional aspirations of the previously-strong Republican candidate in the Third District, it is ironic that the thwarting of similar politically

invidious purposes directed at the other Republican incumbents should now be cited in support of the alleged "fairness" of that plan. The District Court therefore properly concluded that this fortuitous turn of events rendered meaningless any evaluation of the "fairness" of the Feldman Plan or its clones, Appellants' Plans A and B, on the basis of the results of the 1980 congressional election.

Similarly, there was sufficient evidence presented to rebut Appellants' contention that hypothetical election results projected on the basis of data from other unrelated state-wide contests proved the "fairness" of the Feldman Plan. As established by that evidence, the use of such data neither supports nor undercuts the purported fairness of a proposed congressional apportionment plan, since the actual results in such district-specific elections are in large part determined by the personal appeal of the candidates and the extent to which they enjoy an established constituency base—precisely the factors the Feldman Plan attempted to neutralize as to the Republican candidates. Zimmer at T74-6 to -25; T76-7 to -10; T83-21 to -25; T92-8 to -13. Use of such state-wide data further distorts any hypothetical results because they superimpose on the proposed congressional districts the major influence of candidate personalities evident in the elections from which the data are derived.* *Id.* at T87-18 to T88-2.

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* Even if it is assumed that a reliable evaluation of the "fairness" of the Feldman Plan may be made on the basis of these data, Appellants' characterization of those data overstates the hypothetical strength of the Republican Party by counting as a Republican "win" any district in which that Party has a hypothetical

(Footnote continued on following page)

Since no other evidence whatsoever was presented to support the premise that the Feldman Plan furthered any neutral State policy objectives, the District Court therefore could have properly reached the conclusion that the districts which that plan established were "either totally irrational or entirely motivated by a desire to curtail the political strength of the affected political group." *Karcher* v. *Daggett, supra,* —— U.S. at ——, 103 S.Ct. at 2675 (Stevens, J., concurring). Accordingly, under the prior decision of the Court in this case, the lower court properly concluded that the Feldman Plan, and derivatively Appellants' proposals, did not embody any legitimate state interests which would justify their choice over a plan which contained a lower population deviation among districts. The absence of such legitimate state policy objectives similarly compelled the lower court, under *White*

(Footnote continued from preceding page)

plurality. However, it is recognized that districts in which a Party has a plurality of fewer than 55% should instead be characterized as "swing" districts. Zimmer at T46-10 to -20; *cf. Rybicki* v. *State Board of Elections,* 574 F. Supp. 1082, 1103 & n. 65 (N.D. Ill. 1982), supplemented 574 F. Supp. 1147 & 574 F. Supp. 1161. Indeed, consideration of all of the election data introduced in evidence which were aggregated on the Feldman Plan indicates that Appellants in fact rely solely on the three state-wide races which produce the largest number of hypothetical Republican "wins" under their extremely forgiving criteria of "victory." Moreover, data from the races not relied upon by Appellants result in the Democratic candidates prevailing over their Republican opponents in clear wins by a ratio of greater than two-to-one. Exhibit D-2 in Evidence; Appellants' Appendix E.

v. *Weiser*, to decline to accord Appellants' plans any special deference on the basis of their legislative genesis.*

It is therefore beyond reasonable dispute that the lower court did not abuse its discretion in thus selecting the Forsythe Plan, which contained the lowest population deviation figures of *any* plan which was timely proposed by the parties. Since Appellants have not otherwise challenged the reasonableness or validity of the Fortsythe Plan,** this Court should dismiss this appeal in light of the insubstantial federal question involved or, alternatively, summarily affirm the decision of the court below.

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* Contrary to Appellants' allegation, it is not significant that the harshly partisan purposes of the Feldman Plan might not warrant a finding of unconstitutionality if, as a legislatively adopted plan, it was challenged on this basis in the first instance. See Jurisdictional Statement at 12 to 13, citing *Simon* v. *Davis*, ——U.S. ——, 103 S.Ct. 3564 (1983). This is because, under *Karcher* v. *Daggett*, *White* v. *Weiser*, and *Connor* v. *Finch*, the District Court was required to consider those purposes not to decide the question of constitutionality, but instead to determine, respectively, whether the population deviation contained in Appellants' Plans should be considered justified, whether those plans were entitled to any deference as being based on the prior statutory plan, and whether those purposes satisfied the stricter standards applicable to court-imposed plans. See *Wise* v. *Lipscomb*, 437 U.S. 535, 540-41 (1978); *Dunnell* v. *Austin*, 344 F. Supp. 210, 215 (E.D. Mich. 1972).

** The only objection raised by Appellants is that approximately 31% of the State's citizens would be placed in districts different than those established for the 1982 congressional elections by the Feldman Plan. Jurisdictional Statement at 7. However, since this Court has noted that it is only "the maintenance of legislative districts long in effect" which is important when considering voter disruption, *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187, 201 (1972), there is no significant reason to calculate

(Footnote continued on following page)

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the judgment of the United States District Court for the District of New Jersey should be affirmed.

Respectfully submitted,

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Dated: April 13, 1984

(Footnote continued from preceding page)

such disruption on the basis of the Feldman Plan rather than the prior decade-old districts since "the [Feldman] districts are hardly venerable . . . or of pristine ancestry, being allegedly the product of a partisan gerrymander." *Dunnell* v. *Austin, supra,* 344 F. Supp. at 217. Indeed, it is ironic that voter disruption should now be urged in support of Appellants' plans, since it was precisely this purpose—*albeit* directed only at Republican candidates—which motivated the Feldman Plan upon which those proposals are based. In any event, it is recognized that the disruption of voters from prior districts is a factor which should only be considered after satisfaction of all other non-constitutional criteria. *LaCombe* v. *Growe,* 541 F. Supp. 160, 165 (D. Minn. 1982).

No. 83-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALAN J. KARCHER, SPEAKER
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

---

APPELLANTS' REPLY MEMORANDUM

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IN THE

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OCTOBER TERM, 1983

No. 83-1526

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NEW JERSEY ASSEMBLY, *et al.*,
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Appellees.

On Appeal from the United States District Court for the District of New Jersey

---

APPELLANTS' REPLY MEMORANDUM

Appellants submit this reply memorandum because the Motion to Dismiss or Affirm submitted by the State Appellees, we believe, gives a misleading impression of the record. Motion of Appellees Thomas H. Kean, et al., To Dismiss or Affirm, pp. 15-20 [hereinafter "Motion"].

The expert upon whom the State Appellees rely is Republican Assemblyman Richard A. Zimmer. Assemblyman Zimmer is a practicing lawyer who has been a member of the New Jersey Assembly since January 1981, shortly before P.L. 1982, c.1 was enacted. He has an undergraduate degree in political science but no advanced degrees other than his law degree, Zimmer Tr. 6-7. He testified that he had written election analyses for publication by the Ripon Society, a "republican researching policy organization," but had done no other writing for publication. Zimmer Tr. 14-13. He has never

read symposia on reapportionment published by the American Bar Association and the National Science Foundation. He does not know what political scientists are active in the apportionment field. Zimmer Tr. 25-26.

Assemblyman Zimmer testified, in substance, to his belief that the sponsors of P.L. 1982, c.1, had devised and enacted the statute for political reasons. It is this testimony on which the State Appellees rely, *e.g.*, Motion, pp. 16 (Fifth District was "artfully crafted"), 17 ("proponents of the Feldman Plan were not satisfied with the result").

First. Taking Assemblyman Zimmer's disposition testimony for everything it can possibly be worth, it still does not speak to the critical question that must be faced if gerrymandering is cognizable at all. Five Members of this Court have stated that, in order to make out such a claim, there must be a showing that the challenged statute has "diluted" the voting strength of "an identifiable political group," *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653, 2672 (1983) (Stevens, J., concurring), or that it has "invidiously discriminated against a racial or political group," *id.*, at 2687 (White, J., joined by Burger, C.J., Powell and Rehnquist, JJ., dissenting), or that it has the "effect of substantially disenfranchising identifiable groups of voters." *Id.*, at 2689 (Powell, J., dissenting). Assemblyman Zimmer's testimony—that he thought his political opponents were politically motivated in passing their bill—ignores this issue. Indeed, on questioning Assemblyman Zimmer repeatedly stated that he had not even done statistical comparisons for districts which he believed were gerrymandered.* The only record evidence on the district-by-district political

* For example, Assemblyman Zimmer testified that a district was "competitive" if the party split was closer than 55-45. However, he had never looked to see whether the 7th District, which he viewed as gerrymandered, fit within his definition of a competitive district.

effects of P.L. 1982, c.1, and appellants' proposed plan—Dr. Thomas Mann's study of the various proposals in light of ten recent elections—belies any gerrymandering claims. See our Jurisdictional Statement, pp. 18-19.

Second. It is doubtful that the District Court (which had prohibited inquiry into the Governor's motives in vetoing the Brown-Lynch bill, see Transcript 3) relied on Assemblyman Zimmer's testimony about what he thought of his political opponents' motives. Certainly the District Court never mentioned that testimony in its opinion. But in any event, this Court should not hold that a redistricting statute is an unconstitutional gerrymander, and may therefore be ignored by a District Court seeking to redistrict a State, whenever an opposing legislator (whether or not accepted as an "expert" by the District Court) can be found to swear that he believes his opponents motives were bad.

CONCLUSION

Appellants do not believe that the question of gerrymandering need be or should be addressed on the present record. The District Court made no such finding. It believed, erroneously, that the issue was foreclosed by this Court's previous decision in the case. It therefore erred in disregarding the State policies embodied in P.L. 1982,

---

Zimmer Tr. 76-77. He agreed that looking at the results of gubernatorial and presidential elections "would be part of a comprehensive analysis," but he had never done that. Tr. 91, 86.

Assemblyman Zimmer's definition of a gerrymandered district is difficult to comprehend. He apparently believes that Democrats are given a partisan advantage if *either* (a) a district becomes more strongly Democratic, or (b) a district becomes more strongly Republican. The first change "bolsters" Democratic strength. The second change "dumps" Republicans. See Zimmer Tr. 92. Under Assemblyman Zimmer's test, it would appear that the only way to avoid a charge of gerrymandering is to forever fix the political composition of every district in the State.

c.1, and substituting its own views on redistricting policy for the State's.

For the reasons set forth in our Jurisdictional Statement, the judgment should be reversed.

Respectfully submitted,

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April 24, 1984

No. A- 740

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ALAN J. KARCHER, Speaker New Jersey General Assembly, et al.,

Appellants,

v.

GEORGE T. DAGGETT, EDWIN B. FORSYTHE, et al., JAMES A. COURTER, THOMAS H. KEAN, as Governor of the State of New Jersey, IRWIN KIMMELMAN, as Attorney General of the State of New Jersey, and JANE BURGIO, as Secretary of State of the State of New Jersey,

Appellees.

On Appeal from the

United States District Court for the District of New Jersey

MEMORANDUM IN OPPOSITION TO APPLICATION FOR STAY OF JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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No. A-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ALAN J. KARCHER, etc., et al.,

Appellants,

v.

GEORGE T. DAGGETT,
EDWIN B. FORSYTHE, et al.,
JAMES A. COURTER, and
THOMAS H. KEAN, etc., et, al.,

Appellees.

On Appeal from the

United States District Court for the District of New Jersey

MEMORANDUM IN OPPOSITION TO APPLICATION FOR STAY OF JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

To the Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Third Circuit:

Appellees Edwin B. Forsythe, et al. submit this memorandum in opposition to the application of appellants Alan J. Karcher, et al. "for a stay pending final disposition of the appeal" and for "expedited consideration" of the appeal. In opposition to this application, appellees Forsythe, et al. respectfully show as follows:

I. PROCEDURAL HISTORY

1. Appellees Edwin B. Forsythe, et al. (hereinafter "appellees") are four incumbent Republican members of Congress from the State of New Jersey, as well as other New Jersey citizens. Appellees Kean, et al. are the Governor, Attorney General and Secretary of State of New Jersey. Appellee Courter is a Republican Member of Congress from New Jersey, and appellee Daggett is a private citizen. Appellants Karcher, et al. are the Democrat Speaker of the New Jersey Assembly, the Democrat President of the New Jersey Senate, and seven of the nine Democrat Members of Congress from New Jersey. Congressman Frank J. Guarini, a Democrat Congressman from New Jersey, has declined to joint this appeal. Although Congressman Robert G. Torricelli, the remaining Democrat Member of Congress from New Jersey, is listed as an appellant in the Jurisdictional Statement (JS-11), his name does not appear on the list of those appellants who join in the instant application "for a stay pending final disposition of the appeal". (Application at 1)

2. After this Court's decision in Karcher v. Daggett and the filing of its mandate, the three-judge District Court filed an Order on Mandate on December 19, 1983. (JS App. 31a) The Order formally declared New Jersey

P.L. 1982, c.1, the statute which this Court struck down in Karcher, "unconstitutional as violative of plaintiffs' rights under Article I, § 2 of the Constitution of the United States." The Order further enjoined the state defendants from conducting any elections under P.L. 1982, c.1, and granted the New Jersey Legislature and Governor until February 3, 1984 "to enact a new constitutional plan for reapportionment." The District Court further directed in a letter to counsel that all parties submit no later than February 3, 1984 any redistricting plans which they desired the District Court to consider in the event that the New Jersey Legislature and Governor failed to enact a new constitutional plan by February 3rd. Finally, the Court's December 19, 1983 Order set the matter down for further proceedings on February 7, 1984 if the state had not enacted a new constitutional plan by February 3rd.

3. New Jersey failed to enact any new plan by February 3, 1984, and indeed has enacted no plan to this day. The Democrat-dominated Assembly and Senate passed a purportedly "new" plan, which merely tinkered with the unconstitutional P.L. 1982, c.1, and retained both the unjustified population inequality and gross gerrymandering of P.L. 1982, c.1, the plan this Court invalidated in Karcher. Governor Kean vetoed the bill precisely for those reasons, and the Legislature did not override the veto or even attempt to do so.

4. Contrary to the suggestion in appellants' application, at 4, New Jersey's failure to enact a new constitutional plan by February 3, 1984 was not the result of the

Governor's veto, but rather the result of the Legislature's failure even to pass a plan which was constitutional.

5. Moreover, there was nothing "hasty" about the February 7, 1984 hearing before the three-judge District Court. Application at 4. That date had been established seven weeks earlier in the December 19, 1983 Order on Mandate. All parties were on notice that all plans were to be submitted by February 3rd and introduced into evidence for the Court's consideration on February 7th. As of the end of the hearing on February 7th, during which all parties made oral presentations to the Court and introduced a myriad of proposed redistricting plans into evidence, as well as other exhibits, the record below was closed and the case was sub judice on that record.

6. As of the closing of the record at the end of the February 7th hearing, the so-called "Plan C" which the New Jersey Senate sought to introduce into evidence at the hearing created non-contiguous districts. The District Court's refusal to admit that plan into evidence, because it had not been submitted by the February 3rd deadline so that all parties could review it and comment upon it at the February 7th hearing, is therefore moot. Even if the District Court had admitted the plan into evidence, it could not have adopted it because of the fatal non-contiguity. The Senate's attempt to submit a "corrected" Plan by letter to the Court on February 15, 1984, more than a week after the record was closed, is meaningless. Once the record was properly closed, on ample notice to all parties, no further evidence or proposed plans could be submitted.

II. THE "APPLICATION FOR A STAY PENDING APPEAL" IS SPURIOUS, AND IN REALITY IS A MOTION FOR SUMMARY REVERSAL OF THE THREE-JUDGE COURT'S UNANIMOUS DECISION

7. Although appellants caption their application as one for a "stay pending appeal," it is not a mere stay request. The entry of a stay would leave no congressional redistricting plan in effect; what appellants really seek is the summary reversal of the District Court's decision and judgment, and a mandatory injunction requiring the implementation of a plan which the three-judge Court carefully considered and unanimously rejected in favor of the plan it adopted.

8. There is no basis for such drastic action, if indeed it is even permitted under Rule 44. If anything, this is an application for a writ of injunction under Rule 44.1. Since this Court has already declared P.L. 1982, c.1 unconstitutional, and in view of the fact that the districting plan which preceded P.L. 1982, c.1 was rendered unconstitutional by the 1980 census' decrease in New Jersey's allotment of Members of Congress from 15 to 14, the entry of a mere "stay" of the District Court's unanimous judgment would leave New Jersey with no congressional districting plan in place at all.

9. It is for this practical political reason that appellants seek far more than a mere stay. What they urge this Court to do by their application to the Circuit Justice is to enter a mandatory injunction requiring implementation of some plan which the District Court either already has rejected or which was never timely placed before it for consideration. The appeal before this Court is devoid of any

substantial federal question, and there is certainly no basis for such drastic action upon an appeal as to which there is no reasonable probability that four Justices will note probable jurisdiction. As Justice Brennan wrote in a similar context:

> Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below --- both on the merits and on the proper interim disposition of the case --- are correct.

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Appellants have failed to make any such showing here.

III. THE DISTRICT COURT'S UNANIMOUS JUDGMENT WAS A WELL-REASONED APPLICATION OF KARCHER TO THE PLANS PROPERLY BEFORE IT, AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION ON THIS APPEAL

10. The unanimous District Court stated the basis of its analysis under Karcher in clear and unexceptional terms:

> While Karcher v. Daggett considers what interests may be taken into account by state legislatures in justifying deviations from the ideal of district population equality based on the decennial census, it also provides useful instruction to district courts faced, as we are, with selecting a districting plan because of a failure in the legislative process. We may take into account at least those factors which the Court has recognized as legitimate, namely: making districts compact, preserving municipal boundaries, preserving cores of prior districts, avoiding contests between incumbents, and inhibiting gerrymandering.

(JS App. 6a) The three-judge Court's application of these criteria to the plans before it justified and required its adoption of the Forsythe plan, and mandated the rejection of the plans which appellants seek to have this Court implement without argument or full consideration by this Court.

11. As the District Court noted, appellants' contention that White v. Weiser, 412 U.S. 783 (1983), required the three-judge Court to adopt appellants' plan because it was most like the unconstitutional P.L. 1982, c.1, stands Weiser on its head. This Court specifically held in Weiser that "the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge." 412 U.S. at 797, J.S. App. 8a. The District

Court found as a fact that the state policy which underlay the unconstitutional P.L. 1982, c.1, and which was carried forward in appellants' plan, "was to deviate from the norm of population equality for the patently discernable purpose of partisan advantage. That policy was not merely vulnerable to legal challenge; the challenge succeeded. We owe no deference to an unconstitutional statute." The District Court thus abided by Weiser. This Court cannot disturb that finding of fact without a showing that it was clearly erroneous, and appellants have not even attempted to make such a showing.

12. The District Court properly applied the balancing of conflicting districting criteria which was the essence of its remedial function in the absence of legislative action. See J.S. App. 11a-12a. It considered the fact that the Forsythe plan achieved a maximum population variance of only 25 persons out of districts of more than 526,000 people. Thus the Forsythe plan achieved the lowest population deviation of any plan which was before the District Court. Appellants totally ignore the evidence introduced at the hearing on February 7th. Appellees introduced evidence establishing without contradiction that the Forsythe plan achieved the most compact districts of any plan before the Court. It avoided placing incumbents in the same districts. It preserved a black majority in the Tenth District better than appellants' plan, and the District Court found as a fact that unlike appellants' plan, "[n]o evidence has been offered from which we could find that it is designed to achieve partisan advantage." J.S. App. 12a.

13. The only alleged disadvantage of the Forsythe plan, and the only real basis which appellants advance for the extraordinary relief they seek here, is that it splits two of New Jersey's municipalities in order to achieve the best population equality and most compact districts of all competing plans. The District Court unanimously found, in the exercise of sound remedial discretion, "that this disadvantage is outweighed by the advantages of compactness and population near uniformity." J.S. App. 12a. Appellants have shown this Court no reason why that finding is constitutionally infirm. Indeed, appellants themselves had submitted plans which split municipalities between districts.

14. Appellants also fail to inform this Court that the 15 New Jersey congressional districts which predated P.L. 1982, c.1, and had been used for ten years, included a split municipality: South Hackensack. See David v. Cahill, 342 F. Supp. 463, 469 (D.N.J. 1972).

15. Appellants misread Upham v. Seamon, 456 U.S. 37 (1982) in the same way as they misread Weiser. Application at 2, 7-8. In Upham, the Attorney General of the United States, under the Voting Rights Act of 1965, objected to the boundaries of two of the State of Texas' 27 new congressional districts. The Attorney General did not object to any districts in Dallas County. Only one of the three District Court Judges determined that any Dallas County district was unconstitutional. The District Court correctly modified the two districts to which the Attorney General had objected, but was held to have erred in redrawing the boundaries of the four Dallas County districts "in the absence of a constitutional or statutory violation with respect to those districts. . . ."

456 U.S. at 40. Here, neither the District Court nor this Court exempted any New Jersey congressional district from the holding that P.L. 1982, c.1 was unconstitutional. Upham therefore cannot be read to have limited the District Court's unanimous exercise of its remedial powers.

16. Appellants have failed to make the four-part showing required by Rostker v. Goldberg, supra, 448 U.S. at 1306. First, they have raised no substantial constitutional deficiency in the District Court's exercise of its remedial discretion, and have failed to demonstrate that the District Court's factfinding was clearly erroneous and that those findings resulted in a constitutionally-deficient judgment. Therefore, they cannot sustain their burden of establishing a reasonable probability that four Justices would note probable jurisdiction. For the same reasons, appellants have also failed to advance persuasive arguments "that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous." 448 U.S. at 1308.

17. Third, there has been no demonstration of irreparable harm in the absence of a stay. On the contrary, it is the granting of the relief sought by appellants which would inflict irreparable harm upon the people of New Jersey, who would again be forced to select their congressional representatives from blatantly gerrymandered and unconstitutional districts. Finally, the balance of the equities is a clear one: compact districts of maximum population equality versus grotesquely gerrymandered districts engineered by appellants in defiance of this Court's own rejection of P.L. 1982, c.1. The interests of the citizens of New Jersey require that appellants' application be denied.

WHEREFORE, appellees Edwin B. Forsythe, et al. pray that appellants' application for a stay of the judgment of the United States District Court for the District of New Jersey, entered on February 17, 1984, as well as for expedited consideration of the appeal, be in all respects denied.

Respectfully submitted,

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By: Jonathan L. Goldstein
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Dated: March 17, 1984

On the Memorandum:

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State of New Jersey
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March 19, 1984

A-740

The Honorable Justices of the
United States Supreme Court
United States Supreme Court Building
Washington, D.C. 20543

Attention: Ms. Katherine Downs
Assistant Clerk

Re: Karcher v. Daggett, Motion for Stay Pending Final Disposition of Appeal, Docket No. A-740

Dear Honorable Justices:

This letter is being submitted on behalf of the State defendants (Thomas H. Kean, Governor, etc., et al.) in reply to the motion of defendants-intervenors to stay the Orders of the three-judge panel entered on February 17, 1984 (as corrected by further Order entered on March 5, 1984) imposing a plan for the election of members to the House of Representatives in New Jersey for the 1984 elections.

Intervenors, as they did before the District Court, continue to characterize the relief they request as a motion for stay. However, if a stay were their true goal, the granting of that relief will leave no plan in place (since the Feldman Plan was

declared unconstitutional by this Court and its use has been permanently enjoined) and would require statewide at-large elections. 2 U.S.C. §2(a). Accordingly, intervenors' request of this Court is not a stay of the Orders of the three-judge panel, but the selection in summary fashion of an alternative plan from among three (really two, see discussion infra) alternatives proposed by intervenors. It is thus apparent that intervenors' motion to stay is in actuality a motion for summary reversal.

Intervenors suggest three alternative redistricting proposals--Plan A (Lynch Plan), Plan B and Plan C. It is important to note that Plan C was never before the three-judge panel for consideration; although it was marked for identification, the panel refused to accept same because it was not timely submitted in accordance with prior orders. As admitted by intervenors, that plan was not in "corrected" form until February 15, 1984, a full week after the hearing had concluded in this matter. Nor can intervenors claim to have been prejudiced by what they assert was a "hastily" scheduled hearing. That date had been set and agreed to by all the parties in a meeting with the district court on December 19, 1983. All of the parties were fully aware that the panel would fulfill its own responsibilities to act in the event the State Legislature was unable to produce a fair congressional redistricting plan that satisfied the constitutional criteria articulated by

this Court by February 3, 1984. When the Legislature did not act by February 3, the three-judge panel properly began its deliberations in this matter. Therefore, appellants' argument that the court below usurped the legislative authority of the State Legislature is wholly without support. The court below intervened only because of the failure of the State Legislature to adopt a redistricting plan that was both constitutional and fair.

Appellants also argue that the two decisions of this Court -- Upham v. Seamon, 456 U.S. 37 (1982) and White v. Weiser, 412 U.S. 783 (1973)--compelled the court below to adopt either Plan A (Lynch Plan) or one of its variants, i.e., Plan B or Plan C (which as noted was submitted out-of-time to the court below). Appellants cite those cases in support of their theory that the three-judge court lacked discretion to select any plan but one based on the unconstitutional Feldman Plan so long as the single constitutional defect of excessive population deviation was cured. They argue further that Upham v. Seamon and White v. Weiser compelled the three-judge court to ignore other defects and to mechanically select one of their proposals as the basis for congressional redistricting notwithstanding the fact that it perpetuated the bizarrely shaped districts of the Feldman Plan on which it was based. Certainly, those cases do not require deference to an unconstitutional State statute which furthers no identifiable neutral State policy. In White v. Weiser, this Court gave consid-

eration to a prior State statute that furthered legitimate State goals. The Feldman Plan, which was intended to pit incumbent against incumbent and enhance one party's political advantage at the expense of the other, plainly did not further legitimate State goals but instead was designed solely to promote partisan political advantage.

In addition, this Court's decision in Upham v. Seamon also has no bearing here. In that case, which concerned a suit under the Voting Rights Act, the district court was held not to have the power to make changes in a total congressional redistricting plan when the Attorney General of the United States had only found constitutional defects in two districts. This Court's holding, therefore, stands simply for the proposition that in fashioning an interim measure under the Voting Rights Act, the district court's jurisdiction is limited to correcting the defects presented to it for review. This matter, however, involves neither an interim measure, nor a district court's limited jurisdiction under a Voting Rights Act challenge. The three-judge panel was charged with reviewing and evaluating proposed congressional district plans that will likely be in effect until the next census. For this reason, it was fully appropriate for it to scrutinize the plans presented to ensure the adoption of a plan that met applicable constitutional criteria as well as furthered significant legitimate secondary State goals of compactness and communities of interest.

The three-judge panel below undertook a careful scrutiny of several alternative congressional redistricting plans submitted to it by the parties to this action. In each case the parties had the opportunity to fully evaluate and test the merits of other plans submitted as well as justifying their own plans. This Court at this juncture should not now overturn that careful and deliberate consideration of the three-judge panel. In addition to this letter in opposition to appellants' request for stay, the State defendants also rely on the letter in opposition to stay submitted to the three-judge panel below as well as its brief and appendix in response to intervenors' arguments on the reach of the White v. Weiser and Upham v. Seamon cases, which was submitted to the three-judge panel.

Respectfully submitted,

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March 9, 1984

Honorable John J. Gibbons
United States Court of Appeals
for the Third Circuit
Post Office & Court House
Building
Newark, New Jersey 07101

Honorable Clarkson S. Fisher
Chief Judge
United States District Court
Post Office & Court House
Building
Newark, New Jersey 07101

Honorable Stanley S. Brotman
United States District Court
Post Office & United States
Court House
4th & Market Streets
P.O. Box 1029
Camden, New Jersey 08101

Re: Karcher v. Daggett
Civil Action Nos. 82-297 and 82-388

Dear Honorable Judges:

This letter is being submitted on behalf of the State defendants in reply to the motion by defendants-intervenors to stay the Orders of this Court entered on February 17 (correcting order entered on March 5, 1984) imposing a plan for the election of members to the House of Representatives. In addition to the stay -- and perhaps in recognition of the obvious fact that a stay will leave no plan in place and require at large elections, 2 U.S.C. §2(A) -- intervenors propose several alternative plans never before considered by the panel or by the parties, and ask the Court to adopt one of them. For the reasons set forth below, intervenors are plainly not entitled to a stay nor should they be permitted at this time to submit alternative proposals to the Forsythe Plan to the Court.

Intervenors' request for a stay should be denied because they are unable to establish that all of the prerequisites to such relief have been satisifed: (1) that irreparable injury

will result if relief is withheld; (2) that there is clear likelihood of success on the merits; (3) that upon balancing of the hardships, the harm to the moving party from denial of the restraints outweighs the damage to other parties if the relief sought is granted; and (4) that the public interest requires the issuance of such relief. Constructors Association of Western Pennsylvania v. Kreps, 573 F.2d 811, 814-815 (3rd Cir. 1978); Ammond v. McGahn, 532 F.2d 325, 329 (3rd Cir. 1976); A.O. Smith Corp. v. F.T.C., 530 F.2d 515, 525 (3rd. Cir. 1976).

Intervenors make no allegations concerning irreparable harm. Nor have they identified with any particularity any harm whatsoever which they may imminently suffer if a stay is denied. They assert baldly that "[i]f no stay is granted and the judgment is reversed, the State of New Jersey will be put to considerable expense in gearing up to implement a plan which never goes into effect " (intervenors' motion at p. 4). Such alleged harm is not individual to the intervenors and thus cannot form the basis of a request for stay. In addition, that allegation is unsupportable. In actuality, the costs associated with running a congressional election exist no matter what configurations of districts are utilized. And, in any event, the expenditures of some monies on the printing of ballots that may not be used does not constitute irreparable injury. Further, as set forth below, the sole example of "irreparable harm" pointed to is premised on the wholly speculative notion that intervenors will prevail on their appeal to the United States Supreme Court.

Intervenors assert there is a clear likelihood they will prevail on the merits before the Supreme Court. Their position is unpersuasive, resting as it does simply on the premise that this Court lacked authority under the decision in White v. Weiser, 412 U.S. 783 (1973) to adopt a plan substantially different in composition from L.1982, c.1 which was declared unconstitutional by the Supreme Court. This argument has already been fully briefed and considered by the Court, which properly rejected it. See Slip Op, pp. 10 to 13. It is quite true as intervenors assert that all the "parties agree that intervenors' proposed plans are closer to P.L. 1982, c. 1, than any of the proposed alternatives." It is precisely for this reason that this Court rejected the Lynch Plan, noting that it owed "no deference to an unconstitutional state statute." Slip Op., p. 11. The Court did, however, select a congressional redistricting plan that had the lowest population deviation of all of the plans submitted to it for review, compact configurations and was not a product of partisan political gerrymandering. For these reasons, it is very likely that the adoption of that plan will be upheld on appeal, rather than reversed in favor of an admitted partisan gerrymander.

It is also plain that when there is a balancing of the hardships and consideration of the public interest, no stay should be granted. The public interest would be disserved if the Feldman Plan, or a congressional plan based on it , were imposed. As detailed in the briefs and in the Court's opinion, the Feldman Plan's purpose and effect were the promotion of partisan political considerations; this accounted for the bizarrely shaped districts which have held New Jersey up to understandable ridicule. Such districts break up communities of interests, alienate voters and undermine faith in the political system. The plan selected by this Court meets the constitutional criteria established by the Supreme Court as well as furthering legitimate secondary state goals. Accordingly, intervenors fail to meet the third and fourth tests for the granting of a stay.

In any event, the purpose of a stay is to maintain the status quo. Intervenors, however, seek to use their request for a stay as a springboard for the adoption of a new congressional redistricting plan. They really seek reconsideration of the Court's opinion under the guise of a stay request. See Fed. R. Civ. P. 59.*

Intervenors have no basis to argue for the adoption of an alternative plan. This Court's Order entered December 19, 1983 directed that any parties proposing congressional redistricting plans should submit same to the Court and to the other parties by February 3, 1984. Intervenors now ask this Court to consider several alternative proposals never properly submitted to the panel or to the parties. These alternative proposals, specifically Senate Bill 1329 (1984) and Senate Bill 1340 (1984), have not been scrutinized by the panel or the parties. There is no guarantee that either of those two plans meet applicable constitutional criteria** or furthers, better than the plan adopted by this Court, secondary legitimate State goals.

Intervenors further assert that the proceedings in this matter have resulted in "handcuffing the designated law-making agencies of the State " (intervenor's motion at p. 2). There is nothing in the Court's order which would prohibit the

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* This Court should not consider a Rule 59 Motion. First, it is out of time, not being brought within 10 days of the entry of the order complained of (Rule 59(d)). Second, defendants-intervenors having filed their notice of appeal to the Supreme Court on March 2, 1984, this Court is without jurisdiction to reconsider the merits of this controversy.

** This is particularly true in light of intervenor's admission that one plan they shought to have the Court accept out-of-time (which the Court declined to do) -- S1233 -- lacked contiguity of districts. (See Intervenor's Motion for Stay, P. 4).

Legislature from acting on proposed congressional redistricting plans. The fact is they have not done so. Moreover, any bill passed by the Legislature would also require gubernatorial review and action. Nor has that happened. At such time as a State law is validly adopted, it would be appropriate to return to this Court for clarification. Until there is a valid State law, any suggestion that the Legislature has been prohibited from acting is premature. It is only because of the complete inability and utter failure of the Legislature to adopt a fair congressional redistricting plan that this Court has been forced to involve itself in this matter.

Lastly, intervenors again raise the prospect of a settlement agreement. No deference is owed to such discussions. The parties had the opportunity to present that plan to the Court for consideration along with all other plans. The Court selected a plan that is fair to all of the citizens of the State; a settlement plan would be nothing more than the product of an agreement among 14 individuals and is deserving of no great weight. In any event, intervenors are factually incorrect when they assert that all of the congressional parties have agreed to a compromise;* we are advised Congressman Courter has not so agreed.

In summary, a stay of the congressional redistricting plan imposed by this Court should be denied. If a stay were granted, the result would be to impose at-large elections. Nor should the Court permit the request for a stay to be turned into a proceeding for reconsideration of the Court's earlier opinion, and the relief granted thereto.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey

Michael R. Cole
First Assistant Attorney General

MRC:km

cc: All Counsel

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* The State defendants certainly made no such agreement.

A-140

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

GEORGE T. DAGGETT,	:	
Plaintiff,	:	Hon. John Gibbons Hon. Clarkson S. Fisher Hon. Stanley S. Brotman
v.	:	
IRWIN I. KIMMELMAN, et al.,	:	
Defendants,	:	Civil Action No. 82-297
and	:	and Civil Action No. 82-388
EDWIN B. FORSYTHE, et al.,	:	
Plaintiffs,	:	
v.	:	
THOMAS H. KEAN, as Governor of the State of New Jersey, et al.,	:	
Defendants.	:	
JAMES J. FLORIO, et al.,	:	
Intervenors.	:	

BRIEF AND APPENDIX ON BEHALF OF STATE DEFENDANTS IN REPLY TO PROPOSED CONGRESSIONAL REAPPORTIONMENT PLANS

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

This matter is before the court pursuant to its Order on Mandate entered December 19, 1983, which permitted the submission of proposed congressional reapportionment plans by the parties to this litigation in the event that a constitutional plan was not duly adopted by the Legislature and Governor of the State of New Jersey by February 3, 1984. Since no such plan has been duly adopted by the State of New Jersey, on February 3, 1984, these defendants proposed that this court adopt Senate Bill 1111 (Da5 to Da13*), otherwise known as the Hagedorn plan, or, alternatively, the Zimmer plan (Assembly Bill 839; Da22 to Da30), while plaintiffs Edwin B. Forsythe, et al. (hereafter referred to as "Plaintiffs") proposed the adoption of an independently formulated plan, and intervenors James J. Florio, et al. (hereafter referred to as "Intervenors") urged that this court adopt Senate Bill 10 (Da14 to Da21) as the reapportionment plan for this State.

Defendants urge that this court reject the suggestion of Intervenors that it formulate its congressional reapportionment plan on the basis of Senate Bill 10.

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* "Db" and "Da" refer to defendants' brief and appendix, respectively, filed in support of their proposed plan. Similarly, "Drb" and "Dra" refer, respectively, to the brief and appendix filed herewith in reply to the other proposed plans.

ARGUMENT

THIS COURT SHOULD REJECT SENATE BILL 10 AS A BASIS FOR THE REAPPORTIONMENT OF NEW JERSEY CONGRESSIONAL DISTRICTS BECAUSE OTHER PROPOSED PLANS BEFORE THE COURT BETTER FULFILL THE CONSTITUTIONAL REQUIREMENT OF THE LOWEST POSSIBLE POPULATION DEVIATION AMONG DISTRICTS, AND BECAUSE THAT PLAN FURTHERS NO IDENTIFIABLE NEUTRAL STATE POLICY OBJECTIVES AND IS BASED UPON AN UNCONSTITUTIONAL PLAN WHICH WAS SPECIFICALLY DESIGNED TO FURTHER INVIDIOUSLY DISCRIMINATORY POLITICAL OBJECTIVES.

As set forth in the brief filed by these defendants in support of the their proposed congressional reapportionment plan, this court now faces the difficult judicial task of balancing the preeminent constitutional requirement that the plan which it adopt contain the lowest population deviation figures possible with legitimate non-constitutional State policy goals. Connor v. Finch, 431 U.S. 407, 415-18 (1977); Wise v. Lipscomb, 437 U.S. 535, 541 (1978); Carstens v. Lamm, 543 F. Supp. 68, 82-83 (D.Col. 1982). Moreover, it is also clear that any plan which this court might adopt must be held to "stricter standards" than a plan which might be legislatively adopted. Connor v. Finch, supra, 431 U.S. at 414.

Accordingly, this court must take special pains to ensure that the plan finally decided upon furthers neutral and legitimate interests of the community as a whole. Ibid.; see also Karcher v. Daggett, 103 S.Ct. 2653, 2670 (1983) (Stevens, J., concurring). Moreover, the Supreme Court has recognized that this court may appropriately reject a proposed plan with lower population deviation figures when another plan more fully accomplishes consistently applied neutral State policy objectives. Karcher v. Daggett, supra, 103 S.Ct. at 2364, n. 11, citing David v. Cahill, 342 F.

Supp. 463 (D.N.J. 1972); Connor v. Finch, supra, 431 U.S. at 420-21; Carstens v. Lamm, supra, 543 F. Supp. at 82.

In this case, Senate Bill 10 has a larger relative overall range* than that accomplished by Senate Bill 1111 which defendants have urged this court to adopt, and will be shown to further no legitimate, consistently applied State policy goals. Moreover, as argued below, the plan proposed by Senate Bill 10 is in fact based on a policy which is inimical to any rational characterization of a legitimate State interest, namely the attempt to gain partisan political advantage through gerrymandering. Accordingly, in the exercise of its equitable discretion, this court should reject Senate Bill 10 as a basis for the formulation of a congressional reapportionment plan for this State.

(a) Population Deviation Among Districts in Senate Bill 10.

As explained by the Supreme Court in Karcher v. Daggett, supra, Article I, §2 of the United States Constitution requires that congressional districts "be apportioned to achieve population equality as nearly as is practicable," and that a variation in population among districts in a redistricting plan may be accepted by the court only if it is "unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." 103 S.Ct. at 2658, quoting Wesberry v. Sanders, 376 U.S. 1, 18

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* Definition of the term "relative overall range" as used in this brief, as well as the terms "ideal average district population," "absolute mean deviation" and "relative mean deviation" used infra, are defined at Db6 to Db7.

1,18 (1964), & Kirkpatrick v. Preisler, 394 U.S. 526, 530, 535 (1969). In this case, Senate Bill 10 has an absolute range of 67 persons, for a relative overall range of 0.01273%. See Defendants' Exhibit H, attached to Affidavit of Harold Berkowitz (hereafter referred to as "Berkowitz Affidavit") previously filed herein. However, these figures are clearly inferior to those established by Senate Bill 1111, which has an absolute range of 0.01140%. Id. at Exhibit G. In addition, Senate Bill 10 fails to improve the absolute mean deviation of 11.50 persons or the relative mean deviation of 0.00218% established by the Hagedorn plan. Id. at Exhibits G & H.

As a result, this court may not accord Senate Bill 10 any serious consideration in its formulation of an appropriate congressional reapportionment plan unless it can be shown that it better achieves the relevant neutral State policy objectives which, as argued in defendants' prior brief, the Hagedorn plan clearly and straightforwardly achieves. Karcher v. Daggett, supra, 103 S.Ct. at 2664 n. 11; Connor v. Finch, supra, 431 U.S. at 420-21. However, as argued below, careful consideration of the redistricting plan proposed by Senate Bill 10 unequivocally demonstrates that it is designed to further no known neutral policy objectives, and that the prior unconstitutional plan upon which it is based is tainted by invidiously discriminatory political objectives.

(b) Non-Constitutional Criteria.

Senate Bill 10 is concededly merely a minor reformulation of L. 1982, c. 1, declared unconstitutional by the Supreme Court,

and has been changed only insofar as considered necessary to lower the population deviation figures which formed the basis of that Court's rejection of that enactment. See, Statement appended to Senate Bill 10 (Da18); Statement of Senator Lynch, Public Meeting of the Senate State Government, Federal and Interstate Relations and Veterans' Affairs Committee on Congressional Redistricting, December 8, 1983 (hereafter referred to as "Public Meeting"), at 1 & 4, previously submitted as Exhibit in support of Intervenor's proposed plan. Since this proposed remedy is thus based upon a prior legislatively adopted plan, as instructed by the Supreme Court in White v. Weiser, 412 U.S. 783 (1973), this court's evaluation of Senate Bill 10 must begin with consideration of the public policy objectives sought to be furthered by L. 1982, c. 1, commonly known as the Feldman plan, the statute upon which it is based. Accordingly, this court may give special deference to Senate Bill 10 only if that evaluation demonstrates that the Feldman plan represented "a genuine effort, untainted by any suspect or invidious motives." Doulin v. White, 535 F. Supp. 450, 453 (E.D. Ark. 1982).

To do otherwise -- to blindly assume that the Feldman plan served legitimate State policies as Intervenors argue this court should do -- would frustrate rather than advance the goals to be fostered by the reapportionment process. A close examination of the policies underlying the Feldman plan, with its "bizarrely" shaped districts, will show that it furthers few legitimate State objectives for redistricting and indeed dues violence to most. In such circumstances, adherence to Intervenors simplistic (and we

submit, wrong) reading of White v. Weiser would work the very result cautioned against by Justice Stevens in his concurring opinion in Karcher v. Daggett, supra, 103 S.C. at 2677-77:

> If population equality provides the only check on political gerrymandering, it would be virtually impossible to fashion a fair and effective remedy in a case like this. For if the shape of legislative districts is entirely unconstrained, the dominant majority could no doubt respond to an unfavorable judgment by providing an even more grotesque-appearing map that reflects acceptable numerical equality with even greater political inequality. If federal judges can prevent that consequence by taking a hard look at the shape of things to come in the remedy hearing, I believe they can also scrutinize the original map with sufficient care to determine whether distortions have any rational basis in neutral criteria. Otherwise, the promise of Baker v. Carr and Reynolds v. Sims -- that judicially manageable standards can assure 'full and effective participation by all citizens,' 379 U.S. at 5465 -- may never be fulfilled.

This is the very consequence Intervenors seek to work in this case; White v. Weisner properly construed requires no such result.

In White v. Weiser, the Supreme Court considered the propriety of the adoption by a three-judge panel of a congressional reapportionment plan "solely on the basis of population considerations," notwithstanding the fact that another proposed plan "achieved the goal of population equality to a greater extent" and "most clearly approximated the reapportionment plan of the State Legislature." That plan had previously been declared unconstitutional on the basis of population deviations, and was specifically designed "to preserve the constituencies of congressional incumbents" and to avoid contests among them. 412 U.S. at 791, 796. Noting that the formulation of districts in a manner which minimized contests be-

tween incumbents was a valid State policy, 412 U.S. at 797, quoting Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966), the Court held that "the District Court erred in so broadly brushing aside state apportionment policies without solid constitutional or equitable grounds for doing so." 412 U.S. at 797, quoting Whitcomb v. Chavis, 403 U.S. 124, 161 (1971). The Supreme Court accordingly concluded that the District Court abused its discretion in failing to defer to the legitimate State legislative policy objectives reflected in the proposed plan, as a minor reformulation of the prior enactment, without specifically setting forth any "good reason[s]" for failing to do so. 412 U.S. at 796-97.

The principle underlying White v. Weiser that deference to a proposed plan extends only to the extent the plan upon which it is based reflects legitimate State policy goals was explained by the court in Graves v. Barnes, 446 F. Supp. 560 (W.D. Tex. 1977). There, the court considered the contention that a particular proposed plan was "one deserving of indulgent review, by virtue of its purportedly legislative genesis," since it retained some districts of the prior reapportionment statute, while making only "minor changes" in the other districts. 446 F. Supp. at 563 (footnote omitted). Noting that "we of course recognize our duty to respect state apportionment policy," 446 F. Supp. at 563, citing White v. Weiser, supra, the court apparently considered it decisive that the prior legislative enactment had been subject to question earlier in the litigation on the ground that it fragmented minority voting strength. 446 F. Supp. at 563 & n.5; see 408 F. Supp. at 1051-52. In light of this fact, the court considered it "a unlikely argument

- to proclaim as virtue a kinship with that which was riddled with vice," and accordingly rejected the contention that "[t]his once-removed approximation of legislative intent [thereby] cloak[s] the present plan with the mantel of state policy, thereby [lending] it a preferred status over the plaintiffs' proposal." 446 F. Supp. at 563. As stated by the court:

> It is, therefore, only to the extent that the present plan demonstrates a legitimate state policy that it enjoys that privileged review which might have been presumptively accorded its predecessor [446 F. Supp. at 564 (emphasis in original).]

See also Terrazas v. Clements, 537 F. Supp. 514, 528, 537 (W.D. Tex. 1982).

It is thus apparent that, contrary to Intervenors' contention, White v. Weiser does not require that this court pay mechanical obeisance to the prior unconstitutional reapportionment plan, but instead requires that this court focus its attention on the underlying public policy objectives sought to be furthered by that statute.* In addition, as discussed below, the specific holding of Weiser also requires that this court decline to accord Senate Bill 10 any special deference since the Feldman plan upon which it is based was specifically designed to maximize the number of contests between Republican incumbents.

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*Moreover, contrary to Intervenors' contention, other District Courts have not "followed [the] lead" of their erroneous interpretation of White v. Weiser. See Intervenors' Brief in Support of Proposed Plan (hereafter referred to as "Ib"), at 4 n.3. As noted above, Doulin v. White, supra, specifically held that deference should be accorded a prior legislatively adopted plan only if that prior plan is free of any taint of suspect or invidious motives. 535 F. Supp. at 453. The citation by Intervenors of Shayer v.

(Footnote Continued On Following Page)

This conclusion is not altered by the Supreme Court's decision in Upham v. Seamon, 102 S.Ct. 1518 (1982). Intervenors rely on it for the proposition that the plan adopted by this court may not depart from the prior unconstitutional plan in the absence of a finding that other statutory or constitutional violations are implicated by the prior plan. See Ib3 to Ib4. Upham involved a challenge to a congressional reapportionment plan under the Voting Rights Act ("VRA"), 42 U.S.C. §1973c, on the ground that it was legally unenforceable because the United States Attorney General had failed to certify compliance with the VRA as to two specific districts in the reapportionment plan. 102 S.Ct. at 1519; Seamon v. Upham, 536 F. Supp. 931 (E.D. Tex. 1982), vacated and remanded 102 S.Ct. 1518 (1982). Concluding that the failure to obtain this "preclearance" as to these two districts rendered the entire plan a nullity, the District Court in formulating an interim reapportionment plan, altered the composition of other districts established by the statute in order to render the rest of the districts established by the statute more racially "fair." 102 S.Ct. at 1519-1520. In reversing the lower court's decision, the Supreme Court

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Kirkpatrick, 541 F. Supp. 922, 932 (W.D. Mo. 1982), aff'd 456 U.S. 966 (1982), Carstens v. Lamm, 543 F. Supp. 68 (D. Col. 1982), and O'Sullivan v. Brier, 540 F. Supp. 1200, 1202 (D. Kan. 1982), is similarly unsupportive of their contention since each of those cases involved the establishment of a court-formulated plan in the absence of any legislative reapportionment enactment following the decennial census. This court's decision in David v. Cahill, 342 F. Supp. 463 (D.N.J. 1972), cited at Ib4 for the same proposition, is also inapposite since that case, too, involved an otherwise valid redistricting statute which was simply rendered constitutionally "outmoded" as a result of the issuance of a new census. See 342 F. Supp. at 464-65; L. 1966, c. 183.

held that in adopting an interim plan to replace a reapportionment statute rendered legally unenforceable as a result of an Attorney General objection to certain districts, the District Court could alter only those particular districts in the absence of a specific finding that the composition of other districts otherwise violated the VRA, the Constitution or relevant statutory provisions. 102 S.Ct. at 1521-22.

Upham thus stands for a principle no broader than that an interim plan adopted by a District Court under the VRA may only reformulate those districts objected to by the Attorney General, in the absence of an adjudication as to other districts in the statutory plan. The subsequent District Court decisions which have applied Seamon have recognized its limited application to the formulation of interim plans under the VRA, and have noted that the Supreme Court's decision does not limit the District Court's authority to fully review constitutional and other public policy questions raised by the parties incident to the subsequent formulation by the court of a final redistricting plan. Burton v. Hobbie, 543 F. Supp. 235, 239 (M.D. La. 1982); Jordan v. Winter, 541 F. Supp. 1135, 1142-43 (N.D. Miss. 1982).

As noted in defendants' prior brief, the appropriate non-constitutional criteria include the extent to which Senate Bill 10 and the Feldman plan upon which it is based preserve municipal and county boundaries, the contiguity and relative compactness of the congressional districts which they establish, and whether those districts correspond with recognized communities of interest. Karcher v. Daggett, supra, 103 S.Ct. at 2663; David v. Cahill,

supra, 342 F. Supp. at 469-70; Skolnick v. State Electoral Board of Illinois, 336 F. Supp. 839 (N.D. Ill. 1971). Additional appropriate considerations include whether those districts avoid contests between incumbent congresspersons, Karcher v. Daggett, supra, 103 S.Ct. at 2663; White v. Weiser, supra, 412 U.S. at 791, and whether the Feldman plan and its progeny, Senate Bill 10, are fundamentally fair in their purpose and effect with respect to racial* or political groups. Ibid.; Carstens v. Lamm, supra, 543 F. Supp. at 81. Finally, in assessing these secondary considerations, the court should take a flexible approach depending upon "the importance of the State's interest [and] the consistency with which the plan as a whole reflects those interests ...." Karcher v. Daggett, supra, 103 S.Ct. at 2663.

The federal courts have attached "great importance to the preservation of county and municipal boundaries" in the formulation of congressional reapportionment plans, and have held that these governmental units should be split "only if absolutely necessary to maintain a constitutional population variance." O'Sullivan v. Brier, supra, 540 F. Supp. at 1203; see Karcher v. Daggett, supra, 103 S.Ct. at 2663; Gaffney v. Cummings, 412 U.S. 735, 742 (1973). A high priority has been given to this goal "because the sense of community derived from established governmental units tends to foster effective representation," Carstens v. Lamm, supra, 543 F. Supp. at 88, and because the unnecessary fracturing of these units would entail "innumerable administrative problems and additional

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*The relative racial fairness of Senate Bill 10 is discussed at Db14 to Db17, and will not be further addressed herein.

costs," as well as "confusion among voters" in the divided governmental units. Shayer v. Kirkpatrick, supra, 541 F. Supp. at 933.

In this case, neither Senate Bill 10 nor the Feldman plan upon which it is based splits municipalities,* but both plans divide the 21 counties of the State into 55 fragments. See Da1 to Da2; Karcher v. Daggett, supra, 103 S.Ct. at 2690 n.4 (Powell, J., dissenting). In light of the expressed State policy of using counties as a basic unit of governmental, judicial and law enforcement organization, see Db10, Senate Bill 10 and the Feldman plan upon which it is based must be rejected by this court as a legitimate expression of State public policy unless those plans sufficiently further other recognizable neutral public policy objectives to an extent sufficient to outweigh this defect in the plans which they establish. O'Sullivan v. Brier, supra, 540 F. Supp. at 1203-04.

The second factor to be considered is the shapes of the districts established by the Feldman plan in terms of their contiguity, relative compactness and the extent to which they correspond with readily identifiable communities of interest. A cursory glance at the map of the districts established by the Feldman plan "illustrates ... far better than words can describe" the fact that

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*It should be noted that Intervenors' "Plan B" does split municipalities in order to obtain purported absolute population deviation ranges of 25 persons. See Ib19. Since the absolute population deviation range of 60 persons accomplished by Senate Bill 1111, the Hagedorn plan, clearly constitutes a good-faith effort to accomplish absolute population equality, see Db6 to Db8; Karcher v. Daggett, supra, 103 S.Ct. at 2658, this court should decline to rely on this proposed plan since it thus fails to further the legitimate secondary criteria, discussed above, of preserving the integrity of these municipal governmental units.

the districts that plan establishes are "nothing more than ... artificial unit[s] divorced from, and indeed often in conflict with, the various communities [of interest] established in the State." Karcher v. Daggett, supra, 103 S.Ct. at 2689 (Powell, J., dissenting; footnote omitted); see Da2.

As set forth in the testimony of Assemblyman Richard A. Zimmer, the districts established by this plan sprawl across the State with no explicable correspondence to any community of interest. See Deposition of Richard A. Zimmer (February 4, 1984) (hereafter referred to as "Zimmer"), filed with the court herewith, at T40-2 to -7. This defect has not been remedied by the minor adjustments made in the Feldman plan by Senate Bill 10, either in its present form or in its incarnation in the prior session of the Legislature as Senate Bill 3564. See id.; Public Meeting, supra, at 8-9 (Statement of Senator Gerald Cardinale).* The districts established by the Feldman plan have thus been characterized as "uncouth" and "bizarre," 103 S.Ct. at 2676 (Stevens, J., concurring; footnotes omitted), and it has been noted that they do not suggest "any attempt to follow natural, historical, or local political boundaries." Id. at 2690 (Powell, J., dissenting). It has accordingly been observed that the quality of representation under these districts will of necessity suffer, since "the boundaries are

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*This to be compared with Senate Bill 1111, which remedies specific problems noted with the Feldman plan. See Public Hearing before the Senate State Government, Federal and Interstate Relations and Veterans' Affairs Committee on Senate Bill 3784 [the version of Senate Bill 1111 considered by the prior session of the Legislature] (hereafter referred to as "Public Hearing") (December 15, 1983), at 6 (Testimony of Senator Donald T. DiFrancesco), previously submitted herein as Intervenors' Exhibit.

so artificial that they are likely to confound the congressmen themselves." Ibid.

As a result, the districts which the Feldman plan establishes present "little more than crazy quilts completely lacking in rationality [which] could be [rejected by this court] on that basis alone." Reynolds v. Simms, 377 U.S. 533, 568 (1964) (footnote omitted); see also 103 S.Ct. at 2669 (Stevens, J., concurring). No contrary evidence to justify these shapes on rational neutral criteria has been offered by Intervenors in these proceedings. This court must therefore conclude that the "strangely irregular" districts which it establishes do not constitute "an ordinary geographic redistricting measure even within the familiar abuses of gerrymandering," and should accordingly reject Senate Bill 10 which is based on, and substantially identical with, that plan. Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960). Although Senate Bill 10 does make some minor adjustments in the shapes of the Feldman districts, see Da3, Da14 to Da21, it does so only insofar as is necessary to eliminate the basis for the embarrassing characterizations of some of the districts in the prior plan,* and while other changes may have been made in an effort to reduce population deviation, there is evidence to suggest that some served decidedly

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*For example, Feldman District Thirteen has been criticized for extending from the outskirts of Camden to the suburbs of New York City, see 40 Cong. Q. 1190 (1982), cited at 103 S.Ct. 2676 n.31 (Stevens, J., concurring), while District Three has been characterized as "contiguous only for yachtsmen." Daggett v. Kimmelman, 535 F. Supp. 978, 984 (D.N.J. 1982) (Gibbons, C.J., dissenting), aff'd 103 S.Ct. 2653 (1983); Karcher v. Daggett, supra, 103 S.Ct. at 2677 n.33 (Stevens, J., concurring); id. at 2690 (Powell, J.,

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political purposes as well (Zimmer at T43-20 to T44-4; T44-5 to -13; T71-16 to -19; T71-23 to 72-14).

The failure of the Feldman plan to abide by the neutral principles of compactness and community of interest similarly collides, apparently by design, with the established principle that it is appropriate to formulate a plan which avoids contests between incumbents and does not require a congressperson to run in a district other than the one in which he or she resides. See Burns v. Richardson, supra, 384 U.S. at 89 n. 16; White v. Weiser, supra, 412 U.S. at 791. See Db12 to Db13. Senate Bill 10 similarly violates this principle since Congressman Rinaldo must still run outside his home district (he resides in the Twelfth but represents the Seventh), although Representatives Smith and Courter have apparently relocated as a direct consequence of the Feldman Plan. However, this court, in assessing the validity of the shape and character of the districts Senate Bill 10 establishes, must, under White v. Weiser, look to Feldman not solely to which for a deter-

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dissenting). Similarly, the Fifth District has been called "the Swan" as a result of the meandering arc it carves across the northwest portion of the State, while the likeness of the Fourth District has been compared with that of a "running back." 103 S.Ct. at 2676 & n.31 (Stevens, J., concurring). Senate Bill 10 accordingly added the northern-most municipalities of the Thirteenth District to adjacent District Three, thereby undercutting the characterization of the former district as stretching as far as "the New York suburbs," while also "shoring up" the tenuous contiguity of the Third District. The Lynch Plan also removed the "beak" of the Fifth District, thereby making it more difficult to compare its shape with that of a waterfoul, but is less successful with its alteration of the "running back" Fourth District, which now simply resembles instead a baseball batter winding up for a a swing. See Da3.

mination whether these neutral principles may have motivated the contorted districts established.

The Feldman plan clearly fails to honor neutral principles. District Five was carved out so as to include the hometowns of two incumbent Republican congresspersons, while the hometown of the Republican incumbent from the old Fourth District was placed in a different district held by a Democratic incumbent. In addition, the Feldman plan pitted an additional two Republican congresspersons against one another in the new Twelfth District. See Daggett v. Kimmelman, supra, 535 F. Supp. at 984 (Gibbons, C. J., dissenting); Karcher v. Daggett, supra, 103 S.Ct. at 2677 n. 33 (Stevens, J. concurring); id. at 2690 (Powell, J., dissenting); Defendants' Exhibit O, Affidavit of George W. Bloom, previously submitted in support of defendants' proposed plan. Once again, the Feldman plan, upon which Intervenors rely in urging this court to accept Senate Bill 10, fails to affirmatively further these neutral policies and, instead, does violence to any reasonable understanding of the purposes these principles are intended to accomplish. Moreover, the full impact of the Feldman plan's departure from these particular criteria can only be appreciated in the context of the larger question of the fundamental political fairness of that plan.

It is well-established that in devising a reapportionment plan a court should consider the political fairness of proposed plans in terms of their effect on major political parties. See In re Illinois Congressional Districts Reapportionment Cases, No. 81-C-3915 (N.D. Ill. 1981), aff'd sub. nom. Ryan v. Otto, 454 U.S.

1130 (1982), at 19-22 (Da57 to Da60). Application of this principle in this context is consistent with the holding of the Supreme Court that a legislatively enacted plan may properly be designed to insure "political fairness," Gaffney v. Cummings, supra, 412 U.S. at 752, and the further admonition of that Court against "the danger of apportionment structures that contain a built-in bias tending to favor particular geographic or political interests." Abate v. Mundt, 403 U.S. 182, 186 (1971). Accordingly, in order to determine whether this court should, as Intervenors urge, defer to Senate Bill 10 as a reflection of the legislative judgment contained in L. 1982, c. 1, this court must insure that the reapportionment plan upon which the Lynch Bill is based is not designed merely "to solidify their own partisan electoral support." Skolnick v. State Electoral Board of Illinois, supra, 336 F. Supp. at 844; see White v. Weiser, supra, 412 U.S. at 791, 797.

This is true notwithstanding the fact that Feldman, if it were presently before this court as a legislative enactment, might not, under existing law, be considered an unconstitutional gerrymander. Although the Supreme Court has frequently stated in dicta that a reapportionment scheme which operates to "minimize or cancel" the voting strength of recognized political elements of the voting population might be considered unconstitutional in certain circumstances, see, e.g., Fortson v. Dorsey, 379 U.S. 433, 439 (1965), it has declined in the past to squarely address the constitutionality of alleged gerrymanders. See, e.g., Wells v. Rockefeller, 394 U.S. 540, 544 (1969). However, in light of the "stricter standards" applicable to court-imposed plans, see Connor

v. Finch, supra, 431 U.S. at 414-15, this court is not obliged to 'pick at random' from the proposed plans even though none may fall to the constitutional scrutiny applicable to legis lative enactments. See Wise v. Lipscomb, 437 U.S. 535, 540-41 (1978).

This principle was explained by the court in Dunnell v. Austin, 344 F. Supp. 210 (E.D. Mich. 1972), in which plaintiffs contended that their proposed plan should be adopted by the court to replace the prior redistricting statute, which was rendered unconstitutional by the issuance of a new decennial census, simply because that proposed plan contained population deviation figures which were "constitutionally defensible." 344 F. Supp. at 215. In rejecting this contention, the opinion noted that "The court's present remedial responsibility is not to review for constitutionality a plan which a legislature has previously enacted ... but rather, to adopt a plan from amongst several competing proposals when a legislature has failed to act." Ibid. The court therefore adopted an alternative proposal which, like the Hagedorn plan proposed by State defendants, "not only is clearly superior relative to a population standard, but also satisfies secondary criteria which would appear reasonably appropriate to a sound plan of redistricting." Ibid.

It is thus irrelevant for purposes of this court's remedial task that, as contended by Intervenors, the Daggett court declined to adjudicate the challenge to the original statute on a gerrymandering basis, or that the Court summarily affirmed the finding of a District Court that a reapportionment statute was not an unconstitutional gerrymander simply because it divided a prev-

iously single-district county among three congressional districts in a manner which enhanced the political strength of the majority party in one of the State's 23 congressional districts.* See Ib7 to 8, citing In re Pennsylvania Congressional Districts Reapportionment Cases, 567 F. Supp. 1507, 1517 (M.D. Pa. 1982), aff'd 103 S.Ct. 3564 (1983).

In this case, it is clear that the Feldman plan upon which Senate Bill 10 is based fails to fulfill any appropriate standard of political fairness, and instead satisfies the classic definition of a gerrymander as a "deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes" articulated by Justice Fortas in his concurring opinion in Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969). Although this court should not be expected to shoulder

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*In this regard, it should be noted that the further allegation of Intervenors that only two of the seven Justices in Karcher v. Daggett considered "any issue of gerrymandering in the case" (Ib7) is similarly based upon the misconception that any discussion of gerrymandering therein is relevant to this case only insofar as the authors of the various opinions considered the issue directly relevant to adjudication of the constitutionality of the statute before the Court. Thus, although the dissenting opinion of Justice White, which was joined by Chief Justice Burger and Justices Powell and Rehnquist, concluded that the population deviation figures contained in the statute did not render it unconstitutional, that opinion expressly states that this conclusion would be different "if appellees could demonstrate that New Jersey's plan invidiously discriminated against a racial or political group." 103 S.Ct. at 2653-2687. However, Justice White declined to reach the issue only because, as presented by the parties, the "issue [is not] before us." Id. at 2687. What is therefore significant for purposes of this court's remedial task is thus not the fact that only two Justices were prepared to address the gerrymandering question in the Daggett challenge, but rather the fact that a majority of five Justices agreed as to the general standards for identifying an unfair gerrymander. This court may, of course, turn to these discussions in formulating its own plan.

the "impossible task of extirpating politics" from the reapportionment process, this court may reasonably be expected to withhold its imprimatur from a proposal which is based upon an unconstitutional statute clearly designed to "minimize or eliminate the political strength of any group or political party." Gaffney v. Cumings, supra, 412 U.S. at 754; see also White v. Regester, 412 U.S. 755, 765 (1973); Whitcomb v. Chavis, 403 U.S. 124, 144 (1971); Burns v. Richardson, supra, 384 U.S. at 89; Carstens v. Lamm, supra, 543 F. Supp. at 81.

Precisely such an invidiously discriminatory political animus is apparent from the legislative history of L. 1982, c. 1 upon which Senate Bill 10 is based. As stated by then-Speaker of the Assembly Christopher Jackman during the period of consideration of the statute in question, "We're [i.e., the Democratic Party] in power and we'll draw the lines.... What's wrong with that? They [the Republicans] drew the lines 10 years ago and now it's our turn."* See Courier-Post, June 19, 1981, previously submitted as Defendants' Exhibit J.** This gerrymandering purpose was reiterated in the now-famous 'Reock letter,' described as "remarkable" and "disedifying," see 103 S.Ct. at 2677 and n.33[j] 537 F. Supp.

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*As this court is well aware, however, the lines drawn "10 years ago" were established by this court in David v. Cahill, although apparently based upon a Republican legislative proposal. See 342 F. Supp. at 467, 469.

**Defendants rely on their Memorandum of Law previously filed herein in support of the admissibility of this and other reported statements concerning legislative enactments made by State legislators.

at 984, in which Speaker Jackman elaborated on this "harshly partisan" theme. See 537 F. Supp. at 989-93.

In addition, Assemblyman Jackman justified the refusal of his Party to confer with Republican leaders concerning reapportionment plans on the basis that "the Republicans didn't invite me ten years ago when they were in the majority. They drew up a plan and gave it to us Democrats like I'm going to give it to them." Newark Star Ledger, June 23, 1981, Defendants' Exhibit K. Furthermore, then-President pro tem of the Senate Matthew Feldman, namesake of the reapportionment plan ultimately adopted, similarly expressed the view that "we are just balancing the mischief the Republicans are up to in other States," and boasted that his Party "used all that science can give us" in order to arrive at "a map that assures the re-election of all our Democratic incumbents, and [which] gives us a fighting chance with some other seats." New York Times, January 26, 1982, Defendants' Exhibit N.

The effectuation of this intent with a vengeance is clear when one considers the manner with which the Feldman plan delineated the State's new congressional districts. The Ninth District may fairly be characterized as the linchpin of this partisan pogrom. That district had theretofore been represented by a Republican incumbent, who had prevailed in the prior election by approximately 40,000 votes out of approximately 190,000 votes cast. See Defendants' Exhibit B, attached to Berkowitz Affidavit. As noted in the testimony of Assemblyman Richard Zimmer,* the drafters of the

*Assemblyman Zimmer is a practicing attorney who is presently serving his second term as a member of the New Jersey General
(Footnote continued on following page)

Feldman Ninth District Plan attacked this partisan "problem" through the addition of strongly Democratic municipalities from Bergen County, while simultaneously eliminating Republican strongholds by shifting them into the already overwhelmingly Republican Fifth District (Zimmer at T38-3 to-10). It was noted that the Feldman plan thus removed 18 towns from the Ninth District which had in 1980 contributed a margin of 22,008 for the Republican candidate, while at the same time adding 19 towns which in 1980 had contributed a Democratic plurality of 1,789 votes (Zimmer at T39-20 to T40-1); see State Defendants' Deposition Exhibit 1 (Dra1 to Dra2).

Although the partisan evisceration of this district may not seem significant when considered in isolation, it set in motion a series of consistently applied efforts which appear, in retrospect, to have been clearly designed to cancel or minimize the otherwise legitimate electoral strength of the Republican Party. Thus, the Feldman Fifth District, which had been used as a "dumping

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Assembly (Zimmer at T6-17 to-24; T6-15 to-16). As a member of the Assembly, he serves on the State Government Committee which has jurisdiction over proposed congressional reapportionment legislation (Zimmer at T10-12 to-18). Prior to serving in the General Assembly, Mr. Zimmer served as Chairman of the New Jersey Common Clause and was a member of that organization's national Board (Zimmer at T7-5 to-12). While serving on that Board, his responsibilities included the evaluation of proposed redistricting reform measures (Zimmer at T16-15 to T17-12; T24-4 to-13). Mr. Zimmer has authored several articles analyzing the voting patterns of this State (Zimmer at T14-8 to T15-21), and has a thorough professional knowledge of the State's demographic composition and voting history (Zimmer at T7-13 to T8-9; T9-6 to T10-6).

ground" for Republican votes from the prior Ninth District, was also artfully crafted to include the hometowns of two Republican incumbents, thus requiring that they either run against one another in the ensuing election, move, or run for election outside of their district of residence. See L. 1982, c. 1; Defendants' Exhibit O, Affidavit of George W. Bloom. The brazen lack of subtlety with which this was accomplished is clear from the 'artificial appendage' of the Fifth District, which swoops down (inside the 'neck' of the 'swan') to encompass the hometown of incumbent Republican Congressman James Courter. See L. 1982, c.1; Da2; Defendants' Exhibit O, Affidavit of George W. Bloom; Zimmer at T30-7to -16 & T77-18 to T78-7; Daggett vs. Kimmelman, supra, 535 F. Supp. at 984 (Gibbons, C.J., dissenting); Karcher v. Daggett, supra, 103 S.Ct. at 2677 n.37 (Stevens, J., concurring); id. at 2690; Powell, J., dissenting).

Although, of course at least two incumbent congresspersons would be forced to reside in the same congressional district as a result of the reduction of the State's congressional delegation, the proponents of the Feldman plan were not satisfied simply with the result that both of the unlucky incumbent congresspersons be Republicans, but instead placed an additional two Republican incumbent congresspersons in the new Twelfth District. See L. 1982, c. 1; Defendants' Exhibit O, Affidavit of George W. Bloom; Zimmer at T30-17 to T31-6. This premeditated pairing of four incumbent congresspersons of one party is, of course, directly contrary to the legitimate policy in the formulation of reapportionments plans of avoiding unnecessary contests among incumbents.

White v. Weiser, supra, 412 U.S. at 791; Skolnick v. State Electoral Board of Illinois, supra, 336 F. Supp. at 843. Moreover, by aggregating disparate but strongly Republican communities around the largely intact Union County core of the highly-popular Republican incumbent of the old Twelfth District (See Defendants' Exhibit B, attached to Berkowitz Affidavit), the structuring of this district, in conjunction with that of the Fifth, clearly appears to have been intended to effectively 'balkanize' what was considered to be an irremediably Republican portion of the State. The strategy was obviously to frustrate the potentially troublesome congressional aspirations of prominent Republican figures from the Republican constituencies which were fragmented, while at the same time ensuring the political demise of at least two Republican congresspersons through the pairing of Republican incumbents in both districts. See Zimmer at T30-11 to T32-3; compare Map of David v. Cahill Plan (Da1) with Map of Feldman Plan (Da2).

However, the surgical precision with which the Feldman plan was partisanly drafted is most apparent in the new Third and Fourth Districts. Recognizing that the Democratic incumbent in the Third District was clearly threatened by the aspirations of Republican Assemblywoman Marie S. Muhler, over whom that incumbent had prevailed in 1980 by barely 2,000 votes out of more than 200,000 cast (see Defendants' Exhibit B, attached Berkowitz, Affidavit), the drafters of the Feldman plan took a straightforward approach to neutralizing the Republican upstart: they simply deleted her State legislative district, previously totally incompassed by the old Third District, pratically in toto from the new Third District

(Zimmer at T32-21 to T33-13). In thus 'gutting' the old Third District of its heavily Republican municipalities (which were unceremoniously dumped - in a manner similar to that used in fashioning the new Fifth and Twelfth Districts - in the already overwhelmingly Republican Thirteenth District), while retaining the incumbent Democrats' strongest coastline municipalities, the new district also transferred Assemblywoman Muhler's hometown to the new Seventh District (Zimmer at T32-10 to -20; T37-6 to -19; T80-3 to -9). The apparent motivating factor behind this maneuver was to insure that, in order to compete in the Third District, Assemblywoman Muhler would have to run outside of her district of residence with virtually none of her constituency base -- a set of circumstances which would be severely disabling in any election (Zimmer at T37-16 to T38-2).*

However, this inversion of neutral reapportionment principles in the fashioning of the new District Three did not stop there. Added to that district was the hometown of the Republican incumbent from the old Fourth District, who had been elected for the first time in 1980 in an upset victory in the wake of the indictment of the incumbent Democratic Congressman (Zimmer at T41-12 to -25; T42-1 -4). As a result, this displaced incumbent Republican found himself both removed from his demonstrated electoral stronghold in the south of the old district (see Defendants'

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*The adverse effect of this invidious reapportionment was apparent in the 1982 congressional election, in which Assemblywoman Muhler lost to the Democratic incumbent by more than 43,000 votes, as compared with her narrow defeat by approximately 2,000 votes in 1980. See Defendants' Exhibit C, attached to Berkowitz Affidavit.

Exhibit A, attached to Berkowitz Affidavit), and placed in a district in which he had no constituency base other than his hometown (Zimmer at T31-25 to T32-5). To further discourage this incumbent Republican from running, outside his district of residence, in the new Fourth District, the Feldman plan excised predominantly Republican municipalities in the Burlington County portion of the district and replaced them with strongly Democratic towns (Zimmer at T41-19 to -25). This alteration of the old district also appeared calculated to satisfy the congressional aspirations of a prominent Democratic State Senator by providing him with an 'open' district (Zimmer at T31-25 to T32-5).

What remained of the shredded remnants of the State was left with the dubious distinction of being designated the new Seventh District, otherwise known as 'the fishhook.' See Zimmer at T30-4; Karcher v. Daggett, supra, 103 S.Ct. at 2676 (Stevens, J., concurring), citing 40 Cong. Q at 1194-95 (1982). Comprising, in part, municipalities from the old Twelfth District, where the Republican incumbent was presumably intended to be 'enticed' to the Twelfth District, the new Seventh District appears to have been intended to create another 'open' Democratic district out of one which might otherwise elect a Republican on the basis of the enormous personal appeal of that incumbent (Zimmer at T31-12 to -31).

Thus, it may fairly be said that the Feldman plan was designed as an attempt to preserve existing solidly-Democratic districts and solidify that Party's more marginal districts, while either neutralizing Republican incumbents through displacement from their constituencies, or relegating them to political oblivion

through the internecine Party warfare encouraged through the pairing of Republican incumbents in the new Fifth and Twelfth Districts.

Intervenors nevertheless suggest that the Feldman plan upon which Senate Bill 10 is based must be considered "fair" because, as a result of a fortuitous combination of events, not all of these invidiously partisan objectives were accomplished. However, any "fairness" which might be found in the results of the ensuing 1982 congressional election on this basis must be ascribed to the singleminded resourcefulness of the hard-pressed Republican incumbents, rather than to any neutral virtues intrinsic to the Feldman plan. Critical to this partial failure was the fact that the highly popular Republican incumbent from the old Twelfth District decided to nevertheless run in the 'fishhook' Seventh District, where he ultimately prevailed in the 1982 election, thus thwarting the attempted 'balkanization' of Republican electoral strength in the Central and Northern parts of the State (Zimmer at T79-3 to -9); see Defendants' Exhibit C, attached to Berkowitz affidavit. As a result when, subsequent to the enactment of Feldman, the other Republican incumbent who had been 'paired' in the new Twelfth District decided to run for the United States Senate, the Republican incumbent from the old Thirteenth District, who had been placed with a fourth Republican incumbent in the new Fifth District, was free to move to the Twelfth District, where he subsequently won election, without the prospect of facing a Republican primary opponent (Zimmer at T78-18 to -21).

With the premise of the Feldman plan's attempted gerrymander thus dislodged, the 'dominos' continued to fall in an unanticipated direction with the election of the sole Republican incumbent thus left in the Fifth District (Zimmer at T79-3 to -9). Moreover, the involuntary 'prodigal son' of the old Fourth District returned to his redrawn constituency to an electoral victory which must have similarly confounded the architects of the Feldman plan. See Defendants' Exhibit C, attached to Berkowitz Affidavit. Although the Feldman plan did successfully facilitate the vanquishment of the Republican incumbent in the Ninth District and the eclipse of the congressional aspirations of the previously-strong Republican opponent of the Third District Democratic incumbent, it is ironic that the fortuitous thwarting of similar politically invidious purposes directed at these other Republican incumbents should now be cited in support of the alleged "fairness" of the Feldman plan. See Affidavit of Thomas E. Mann, ¶¶ 10, 11, submitted by Intervenors in support of proposed plan.

This fortuitous turn of events thus renders meaningless any evaluation of the "fairness" of the Feldman plan or its clone, Senate Bill 10, on the basis of the results of the 1980 congressional election. However, it is equally irrelevant to rely on unrelated State-wide election data to support the contention that the districts these reapportionment plans establish are nevertheless fair. See Affidavit of Thomas Mann, ¶10. Specifically, Intervenors rely on election data from the 1980 Presidential election, 1981 gubernatorial election, and the 1982 United States Senate race aggregated according to the districts established by

Feldman and Senate Bill 10, and argue that the districts which those plans establish are demonstrably fair because the hypothetical results under those plans project Republican victories in 11 of the 14 districts under the 1980 results, 8 of the 14 districts under the 1981 results, and 6 out of the 14 districts under the 1982 results. Ibid.

However, as established by the testimony of Assemblyman Zimmer, use of such data neither supports nor undercuts the purported fairness of a proposed congressional apportionment plan, since the actual results in such district-specific elections are in large part determined by the personal appeal of the candidates and the extent to which the enjoy an established constituency base (Zimmer at T74-6 to -25; T76-7 to -10; T83-21 to -25; T92-8 to -13). Thus, looking at unrelated election data in isolation would, of necessity, underestimate the impact, for example, of forcing the conservative Republican incumbent from the old Fourth District to run for re-election in an area in which he is a political unknown, or which was previously represented by a liberal Republican (Zimmer at T74-15 to 20).

Moreover, use of data such as that derived from the 1980 presidential election further distorts any hypothetical results because its superimposes on the proposed districts the major influence of candidate personalities evident in that election (Zimmer at T87-18 to T88-2). The difficulty of assessing "fairness" of a reapportionment scheme is rendered still more problematical under the Feldman plan, since that redistricting scheme was not designed with such generalized election results in mind but instead, as

argued above, with an eye to the circumstances of specific incumbents and congressional aspirants (Zimmer at T91-4 to -8). With a plan such as Feldman, the critical factors are thus the overall intention and design of the plan, as reflected in the specific manipulation of individual districts and the established constituencies of the incumbents and challengers (Zimmer at T96-14 to 21; T97-7 to -16).

However, even if it is assumed that a reliable evaluation of the fairness of the Feldman plan or Senate Bill 10 may be made on the basis of such election data in isolation from the incumbent's constituency and personality, it is apparent that Intervenors mischaracterize the import of the aggregated election data upon which they rely. First, Intervenors count as an hypothetical Republican "win" any district in which there is a projected Republican plurality, regardless of the size of the hypothetical margin. See Affidavit of Thomas E. Mann, ¶10. However, it is recognized that districts in which there is a plurality of fewer than 55% should be characterized as "swing" districts (Zimmer at T46-10 to 20).

Moreover, analysis of the aggregated election data not relied upon by Intervenors in fact reveals that Intervenors' purported demonstration of "fairness" relies only on the three races which produce the largest number of Republican "wins" under their extremely forgiving criteria for hypothetical "victory." Thus, for example, the 1978 United State Senate results project only one reliable Republican victory to ten solid Democratic wins, while the 1978 congressional figures project only three reliable Republican

"wins" to seven solid Democratic victories. Similarly, the 1980 United States Senate results produce only three Republican Districts but yield six solidly Democratic ones. Ibid. It is therefore apparent, even if one accepts Intervenors' premise that aggregated election data are relevant, that the Feldman plan can in no way be considered "fair."

Moreover, as argued above, since the distorted districts which the Feldman plan establishes do not otherwise serve any identifiable public purpose this court must conclude that Senate Bill 10 which is based upon it "is either totally irrational or entirely motivated by a desire to curtail the political strength with the affected political group." Karcher v. Daggett, supra, 103 S.Ct. at 2675 (Stevens, J., concurring). Insofar as the Feldman plan succeeded with its invidious political purpose it is the latter; insofar as it failed in those objectives, it is the former.

Regardless of which characterization this court considers more appropriate, this conclusion requires, under White v. Weiser, that Senate Bill 10 be accorded no special deference by this court as the progeny of that tainted legislative enactment. In light of the further fact that another plan is before this court which contains lower population deviation figures, the "stricter" standards applicable to court formulated reapportionment plans this court should, in the exercise of its equitable discretion, reject Senate Bill 10 as a basis for establishing a congressional reapportionment plan for the State of New Jersey.

CONCLUSION

For the foregoing reasons, this court should reject Senate Bill 10 as the basis for the establishment of a congressional reapportionment plan for the State of New Jersey.

Respectfully submitted,

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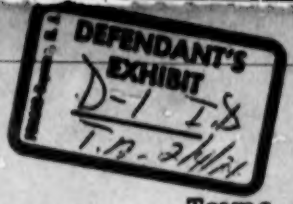
By: Michael R. Cole
Michael R. Cole
First Assistant Attorney General

DATED: February 6, 1984



Towns Removed from the 9th District Under Feldman from Cahill	1980 Congressional
Rockleigh (Bergen)	-55
Northvale (Bergen)	-655
Cresskill (Bergen)	-1056
Demarest (Bergen)	-972
Closter (Bergen)	-1530
Haworth (Bergen)	-747
River Edge (Bergen)	-1934
Harrington Park (Bergen)	-948
Old Tappan (Bergen)	-936
River Vale (Bergen)	-1513
Park Ridge (Bergen)	-1294
Palisades Park (Bergen)	-1933
Ridgefield (Bergen)	-1455
Little Ferry (Bergen)	-829
North Bergen (Hudson)	-3599
Secaucus (Hudson)	-2455
Union City (Hudson)	-1311
Lyndhurst (Bergen)	1214
Total	- 22,008

Towns Added to the 9th District Under Feldman from Cahill	1980 Congressional
Woodcliff (Bergen)	-65
Hillsdale (Bergen)	-325
Washington (Bergen)	-339
Westwood (Bergen)	-407
Emerson (Bergen)	-88
Paramus (Bergen)	920
Glen Rock (Bergen)	-309
Fair Lawn (Bergen)	3097
Elmwood Park (Bergen)	303
Saddle Brook (Bergen)	-184
Rochelle Park (Bergen)	-359
Maywood (Bergen)	-497
Hackensack (Bergen)	1768
Lodi (Bergen)	342
South Hackensack (Bergen)	-152
Hasbrouck Heights (Bergen)	-1167
Woodridge (Bergen)	-142
Bogota (Bergen)	-364
Ridgefield Park (Bergen)	-243
Total	+1,789

Towns Removed from the 9th District Under Lynch from Feldman	1982 Congressional
Bogatar (Bergen)	-162
Carlstadt (Bergen)	-449
East Rutherford (Bergen)	-232
Emerson (Bergen)	-85
Hillsdale (Bergen)	-478
Norwood (Bergen)	-351
Ridgefield Park (Bergen)	-221
Rutherford (Bergen)	-1072
Teterboro (Bergen)	-10
Washington (Bergen)	-410
Westwood (Bergen)	-565
Woodcliff Lake (Bergen)	-175
Total	-4,210

Towns Placed in the 9th District Under Lynch from Feldman	1982 Congressional
Closter (Bergen)	-972
Cresskill (Bergen)	-436
Northvale (Bergen)	-276
Oradell (Bergen)	-1626
Palisades Park (Bergen)	564
River Edge (Bergen)	-939
Rockleigh (Bergen)	-25
North Bergen (Hudson)	6398
Total	+2,688

NO. 83-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALAN J. KARCHER, SPEAKER NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

BRIEF OF AMICI CURIAE, THE COUNTY OF ESSEX, NEW JERSEY, AND THE TOWNSHIP OF BELLEVILLE, NEW JERSEY, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

PAGE

Table of Authorities

Cases Cited

United States Constitution Cited

Statutes Cited

NO. 83-1526

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On Appeal from the United States District Court for the District of New Jersey

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BRIEF OF *AMICI CURIAE*, THE COUNTY OF ESSEX, NEW JERSEY, AND THE TOWNSHIP OF BELLEVILLE, NEW JERSEY, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

Interest of *Amici Curiae*

From 1972 until 1982 the citizens of Essex County, New Jersey constituted the bulk of two congressional districts, and the interests of Essex County were represented in the

United States House of Representatives by two Congressmen.[1] As a result of the population data reflected in the 1980 census, New Jersey was required to reduce its congressional seats from fifteen to fourteen. The New Jersey legislature then enacted a redistricting plan which this Court invalidated, stating:

> The District Court properly applied the two-part test of *Kirkpatrick* v. *Preisler* to New Jersey's 1982 apportionment of districts for the United States House of Representatives. It correctly held that the population deviations in the plan were not functionally equal as a matter of law, and it found that the plan was not a good-faith effort to achieve population equality using the best available census data. *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653, 2655 (1983).

On remand, the district court selected a plan put forth by one of the parties without any legislative imprimature.[2]

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[1] *David* v. *Cahill*, 342 F. Supp. 463 (D.N.J. 1972).

The court in *David* fashioned congressional districts which remained in use until 1980. Essex County comprised the bulk of the 10th and 11th Districts. The 11th District included Nutley, Bloomfield, Belleville, Montclair, Verona, Cedar Grove, Caldwell, West Caldwell, North Caldwell, Fairfield, Essex Fells, Roseland, Orange, West Orange, South Orange, Maplewood and Irvington as well as the Passaic County municipalities of Little Falls and West Paterson, the Union County municipality of Hillside and the Bergen County community of North Arlington. The 10th District included Newark, East Orange, Glen Ridge and the Hudson County community of Harrison. Millburn and Livingston were in the Fifth District with all of Somerset County and parts of Mercer, Middlesex and Morris Counties.

[2] *Daggett* v. *Kimmelman*, —— F.Supp. —— (D.N.J. 1983), Appellant's App. 1a-30a.

This appeal challenges the propriety of the district court's actions.

Amici take the position that the district court by the manner in which it selected its own redistricting plan discouraged and precluded the legislature from enacting a state plan. The court also failed to find that it was impossible to fashion congressional districts of precisely equal size and selected a plan which neither meets the valid policy considerations of the state of New Jersey nor adequately represents the citizens of *amicus* Essex County and its constituent municipality, *amicus* Belleville, New Jersey.

Essex County is a densely populated, urban, industrialized county located in northeastern New Jersey. Included among its twenty-two municipalities is Newark, the state's largest city, with a population of 329,248.[3] More than 40% of county residents are of minority origin.[4] Many are indigent. One out of every six Essex County residents receives some form of public assistance.

Essex County is a body corporate and politic with perpetual succession. N.J.S.A. 40:41A-24. County government is responsible for performing a wide variety of functions and constitutes a basic unit of government. Among the mandatory duties performed by the county are the administration of the courts, maintenance of the office of the prosecutor, N.J.S.A. 2A:158-1 *et seq.*, administration of elections, N.J.S.A. 54:1-36 *et seq.*, voter registration, N.J.S.A. 19:31-2 *et seq.*, administration of public assistance, N.J.S.A. 44:10-1 *et seq.*, maintenance of county roads and facilities including a county jail, jail annex,

[3] 1980 Census.

[4] 1980 Census.

geriatric hospital and hospital for the mentally ill. Other services provided by the county include maintenance of an extensive system of parks, recreation and cultural facilities as well as a vast array of social and health services. A number of federally supported programs are administered at the county level, the largest of which is Aid to Dependent Children. N.J.S.A. 44:10-2. The county has the duty to levy and collect taxes from its constituent municipalities as well as the power to receive and to disburse state and federal funds. N.J.S.A. 40A:4-12.

The executive power of the county vests in the Essex County Executive. It is his duty to "[e]nforce the county charter, the county's laws and all general laws applicable thereto," as well as to supervise the care and custody of all county property, institutions and agencies. N.J.S.A. 40:41A-36. The legislative power of the county vests in the Board of Chosen Freeholders. N.J.S.A. 40:41A-38. On March 14, 1984, the Essex County Board of Chosen Freeholders enacted a resolution disapproving of the Congressional redistricting plan selected by the three-judge district court in this action.[5]

The redistricting plan selected by the court is harmful to Essex County in a variety of ways. The population of Essex now warrants representation by 1.6 rather than 2.0 congressmen. However, although Essex encompasses only 127 square miles and is geographically among the smallest and most compact counties in New Jersey, the plan selected by the district court fragments Essex into four parts. Middlesex is the only other county the plan divides in four. Essex is the principal constituent in only one of the districts, the Tenth. Morris County is the principal constituent of the Eleventh Congressional District. Essex

[5] Appendix A.

County formerly constituted the largest segment of the Eleventh District. The district now stretches from surburbs close to New York City almost to the Pennsylvania border. Essex County residents now comprise less than one-third of the district. Another segment of Essex County residents now comprises less than one third of the Eighth Congressional District which is dominated by Passaic County. Millburn Township is the only Essex County municipality placed in the Seventh Congressional District.

The fragmentation created by the redistricting plan dilutes the vote of Essex County residents. The congressman of each of these districts, with the exception of the Tenth, will focus less upon the particular needs of Essex County. Essex County's interests will have to be balanced with the often conflicting interests of other counties. Morris, Sussex and Warren Counties which make up the rest of the Eleventh District, are principally suburban or rural. The problems of an urban, industrial population do not dominate their concerns.

Some budget figures highlight this problem. In 1983 Essex County received $162,404,835 in federal funds. This is more than twice as much as the county received from the State of New Jersey. The largest portion of these funds went towards public assistance grants and social services. The loss of meaningful access to a congressman may mean harm to a great number of poor people.

Compounding these problems, the redistricting plan severs the Township of Belleville in two. Neither part of Belleville remains in the same Congressional district it has been in since 1972. *Amicus* Belleville is a municipality with a total population of 35,367[6] bordered on the South by Newark, to the West by Bloomfield, to the North

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[6] 1980 Census.

by Nutley and to the East by the Passaic River. Pursuant to the court's plan 30,488 Belleville citizens will be placed in the Eighth Congressional District along with the residents of Bloomfield, Glen Ridge, Montclair and Nutley, for a total of 153,454 Essex County residents, along with 361,334 Passaic County residents. The remaining 4,879 citizens are placed in the Tenth Congressional District along with the citizens of East Orange, Irvington, Newark, Orange and the Union County municipality of Hillside.[7] It is the undisputed policy of New Jersey not to split municipalities when fashioning congressional districts.[8] The other plans submitted to the court did not split municipalities. The division of Belleville is not related to any geographic or neighborhood factors. Instead, three wards from a single municipal district are separated from the rest of the town. The result is an administrative nightmare and an affront to long established state policy.

Summary of Argument

In cases involving congressional reapportionment courts should make every effort to encourage states to enact constitutional congressional districts. To do otherwise runs the risk of permanently removing from the legislature the power to reflect state goals in the establishment of congressional districts and effectively renders meaningless the principle of equal representation, because people with similar concerns will not be voting in the same district.

In this case the district court insinuated itself directly into the legislative process by providing the legislature

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[7] *Daggett*, —— F.Supp., at ——, Appellant's App. 24a.

[8] *Id.*, —— F.Supp., at ——, Appellant's App. 12a.

with inadequate time in which to enact a redistricting plan and by adopting a partisan, political plan as its own. It threw the "equal representation" mandate of Art. I, §2 of the Constitution, *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) to the "lowest bidder". The district court did not find that it was impossible to establish districts of equal population. It simply selected the first plan presented to it with the lowest population differences. This plan was no more and no less political in bias than were the other plans submitted. Valid state policy considerations pertinent to redistricting such as preserving county and municipal boundaries were sidestepped or ignored.

The increase in litigation surrounding congressional apportionment plans suggests that a different approach is warranted. The goal should be not only constitutional districts but districts drawn by the states themselves. Achieving an irreducible deviation among districts may be a job for the courts; but selecting among plans which are unavoidably partisan is not. Neither is it fundamentally a judicial task to decide which state interests in addition to equality to promote.

That is why judicial remedies for unconstitutional districting schemes should be as distasteful to the states as possible. They should be designed both to achieve equality and to impel state action. In New Jersey, this year, a hearing conducted to that end could produce a variety of redistricting schemes. All of them would meet the mandate of equality, but none of them would be palatable to the interests responsible for the present impasse. Hence, the chances are high that such remedies would achieve the atmosphere of compromise that lets government work.

ARGUMENT

I.

Redistricting schemes adopted by the courts must achieve irreducible population deviations in order that population variances among congressional districts will be unavoidable.

This Court has laid to rest the notion that *de minimis* population variances among congressional districts are acceptable. *Karcher* v. *Daggett,* —— U.S. ——, 103 S. Ct. 2653, 2658-59 (1983). "As between two standards—of equality or something less-than equality—only the former reflects the aspirations of Art., 1 §2." *Id.,* —— U.S., at ——, 103 S. Ct., at 2659. Recognizing, however, that some variations in population may be unavoidable, this Court established a two part test to be used in determining the acceptability of state sanctioned congressional apportionment plans, *Id.,* —— U.S., at ——, 103 S. Ct. at 2665; *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), as follows:

> Thus two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good faith effort to achieve equality, the State must bear the burden of proving that

each significant variance between districts was necessary to achieve some legitimate goal. *Kirkpatrick*, 394 U.S., at 532, *cf. Swann* v. *Adams*, 385 U.S. 440, 443-444 (1967). *Karcher*, —— U.S., at ——, 103 S. Ct., at 2658.

None of the plans reviewed by the three-judge district court bore the imprimature of State approval, all having either failed to be passed by the state legislature or to be signed by the governor. As a result, the district court was called upon to fashion its own remedy which it did by adopting a plan of one of the parties. The district court, however, did not find that population variances among districts were unavoidable as required by *Karcher* and *Kirkpatrick*. Having failed to so find the court should have proceeded no further.

If the district court assumed without deciding that some variation from absolute equality was unavoidable, or that a maximum variation of 25 persons, as in the redistricting plan selected by the court, constitutes a *de minimis* variation, then this is contrary to the decision in *Karcher* which absolutely rejects the concept of minimum variations. If 25 persons is an acceptable maximum variation, why not as few as 10 persons, or as many as 100 persons, when each of these variations is less than two-hundredths of one percent of the ideal 526,072 population of a New Jersey congressional district. The district court erred in accepting as the lowest possible population variance the first plan submitted by a party with the smallest numerical deviation. It is for the court, not the parties, to decide what will be the lowest acceptable population variance.

II.

Balancing legislative policies is not an appropriate role for the court.

As this Court has held, legitimate legislative policies may justify variances in population between congressional districts. *Karcher*, —— U.S., at ——, 105 S.Ct. at 2663. Among the legitimate legislative policies recognized by *Karcher* are "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent representatives." *Id.*, —— U.S., at ——, 105 S.Ct. at 2663. Additional policy criteria recognized in New Jersey are "[m]inimum fragmentation of counties," "[r]ecognition of increases in population in newer communities and of decreases in population in older communities," and "[u]se as a starting point of the last legislative determination of appropriate districts." *David* v. *Cahill*, 342 F.Supp. 463, 469 (D.N.J. 1972).

The plan selected by the district court satisfies some of these policies, but so do all the other plans submitted. Each has its strengths and weaknesses. With respect to *amici*, the Eleventh District is compact in shape but not in size. It stretches almost the entire width of the state. Belleville's boundaries are not respected. More than one third of all county residents will be voting in different legislative districts than those in which they voted in 1982 or 1980. The County is divided into four parts.

The district court should not have reached any of these considerations. In fashioning a remedy the district court is held to a higher standard than is the state in developing a plan.[9] The plan selected by the court was not a

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[9] *Connor* v. *Finch*, 431 U.S. 407 (1977); *Chapman* v. *Meier*, 420 U.S. 1 (1975).

legislative enactment and was not entitled to any special deference on policy grounds. *Karcher*, —— U.S., at ——, 103 S.Ct., at 2662-2663; *White* v. *Weiser*, 412 U.S. 783 (1973). The district court by giving such credence to the policies in the plan selected stepped outside the bounds of judicial restraint, substituting its judgment for what should be that of the legislature.

Amici do not suggest that the court is precluded from considering state policy in evaluating reapportionment plans once a finding of irreducible population deviation has been made. Rather, the task must be approached gingerly. As this Court has stated:

> We have repeatedly emphasized that "legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds* v. *Sims*, 377 U.S., at 586, 84 S.Ct., at 1394, for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name. In the wake of a legislature's failure constitutionally to reconcile these conflicting state and federal goals, however, a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task. In such circumstances, the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner "free from any taint of arbitrariness or discrimination." *Roman* v. *Sincock*, 377 U.S. 695, 710 (1963); *Connor*, 431 U.S., at 1833-1834.

The plan selected by the district court does arbitrarily harm *amici*. The district court balanced state policy considerations incorrectly. The trade off between slightly higher population deviation in the other plans submitted to the court, any one of which would have been less harmful to *amici* herein, and the splitting of the county and the municipality is simply unreasonable.

III.

Judicial interventionism discourages the State from developing congressional election districts.

The district court did four things which undermined the likelihood that the state would enact a congressional redistricting plan. The state was not given enough time to act. The district court, on December 19, 1983, set February 3, 1984, as the date by which a redistricting plan could be legislatively enacted or further judicial proceedings would be held. *Dagget,* —— F.Supp., at ——, Appellants App. 4A. However, the primary election will not be held until June 5, 1984. N.J.S.A. 19:2-1. Nominating petitions need not be filed until the fortieth day preceding the election, N.J.S.A. 19:23-14, or April 26, 1984. Taking into consideration that several days may be needed to acquire the 200 signatures necessary for each candidate's nominating petition,[10] more than two and one-half months remained between the date for filing petitions and the date the district court entered its decision.

Secure in the knowledge that the district court would act, nothing compelled the state to act. There was no

[10] N.J.S.A. 19:23-8.

reason for the Democrat controlled legislature and the Republican Governor to compromise or to come together. Had the district court stayed its hand until the last possible moment in which to file nominating petitions additional pressure would have been placed on the legislature and the governor to agree on an apportionment scheme.

A. Prospective restrictions on redistricting plans are unwarranted.

As if to guarantee that the state would not reapportion congressional districts unless required to by the next decennial census the district court order of February 17, 1984 provides that "primary elections and elections for members of the House of Representatives shall be conducted, in New Jersey, until the further order of this court, or until the next decennial census, whichever is later . . ." *Daggett,* —— F.Supp., at ——, Appellants App. 33a.[11] The court has injected itself into the legislative process preempting the mandate to the legislature to apportion congressional districts, and ignoring the presumption that any legislative enactment will pass constitutional muster. There is no precedent for this requirement of prior court review of a validly enacted state redistricting plan.

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[11] Since 1972 elections for members of the House of Representatives in New Jersey have been based upon congressional districts created by the courts rather than by the legislature. *David* v. *Cahill,* 342 F.Supp. 463 (D.N.J. 1972) established congressional districts in New Jersey which were used from 1972 through 1980. In 1982, a plan enacted by the legislature actually was used for the congressional election, but only upon order of this Court that the state's plan could be utilized pending further judicial review.

B. The parties should not be permitted to define the parameters of the Constitution.

The broad role which the court permitted the parties to have in fashioning a judicial remedy further discouraged the legislature from enacting a redistricting plan and inappropriately restricted the responsibilities of the district court. In developing a reapportionment plan the court followed a procedure similar to the one used in *David* v. *Cahill*, 342 F. Supp. 463 (D.N.J. 1972). The parties were permitted to advance redistricting proposals and the court selected from among those submitted into evidence. *Daggett* v. *Kimmelman*, —— F.Supp., at ——. Appellant's App. 4a-5a.

No rationale, apart from that single precedent, is offered for this approach. Nor is the approach compelled by this Court's decision in *Karcher* v. *Daggett*, —— U.S. ——, 103 S.Ct. 2653 (1983). *Karcher* places the burden of proof upon the parties. *Id.* 103 S.Ct. at 2658. The ultimate decision making remains with the court. Permitting the parties to dictate the remedy in a congressional redistricting case remove politics from the floor of the legislature and into the courtroom. Redistricting becomes a "winner take all" process, and the plans submitted reflect that. Prior to *David* v. *Cahill*, congressional districts in New Jersey were based, to the extent possible, on county lines.[12] Newer plans, on the other hand, seem to be framed with

[12] See, for example, *Jones* v. *Falcey*, 48 N.J. 25 (1966) which involved a challenge to the constitutionality of the Congressional District Act. The act preserved the lines of 15 out of 21 counties. In those few districts in which the court found the percent of deviation from the mathematical ideal to be too great, and thus, unconstitutional the remedy suggested was to move entire municipalities into abutting districts. *Id.*, 48 N.J., at 39.

litigation in mind. Population deviations are kept to a minimum, but Essex County is split in four and coupled with rural areas, while Belleville is split in two.

> More important, mere numerical equality is not a sufficient guarantee of equal representation. Although it directly protects individuals, it protects groups only indirectly at best. See *Reynolds* v. *Sims, supra,* 377 U.S., at 561, 84 S.Ct., at 1381. A voter may challenge an apportionment scheme on the ground that it gives his vote less weight than that of other voters; for that purpose it does not matter whether the plaintiff is combined with or separated from others who might share group affiliation. It is plainly unrealistic to assume that a smaller numerical disparity will always produce a fairer districting plan. *Karcher,* —— U.S., at ——, 103 S.Ct., at 2671. Stevens, J. concurring.

If litigation were not viewed as a way to gain political advantage, it would not be surprising to see the State return to the system of county based districts used before *David.*

C. Judicial remedies must minimize the need for continued judicial intervention and pressure the States to redistrict responsibly.

The plethora of cases challenging the composition of congressional districts as well as the number of states electing their members to the House of Representatives pursuant to court ordered rather than legislatively enacted plans suggests that the remedies employed by the district courts have not achieved the goal of state initiated congressional redistricting.

A remedy must be sufficiently unpalatable to provoke legislatures to enact constitutional redistricting plans rather than run the risk of judicial intervention. Selecting among plans which are unavoidably political is not a job for the courts. A refusal to select from among partisan schemes will encourage the States to take their redistricting obligations seriously.

CONCLUSION

All the redistricting plans submitted to the district court were partisan and political. The plan selected by the court impacts *amici* adversely. If this case is not remanded, there is a strong probability that, as has been the case since 1972, New Jersey will select its congressional representatives by a plan reflecting the preferences of the court rather than the will of the people.

The district court should be directed to take all steps necessary to encourage the state to develop a constitutional redistricting plan. If that fails, the court should develop its own plan rather than rely on a plan submitted by one of the parties. As a last resort, the court should re-evaluate the plans to select one which is more consistent with New Jersey state policy.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX A

Resolution No. 04086 of the Board of Freeholders, County of Essex

COUNTY OF ESSEX, NEW JERSEY

BOARD OF CHOSEN FREEHOLDERS

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

I Daniel W. Gibson, Jr. Clerk of the Board of Chosen Freeholders of the County of Essex in the State of New Jersey.

Do hereby certify, the foregoing to be a true copy of a resolution adopted at a meeting of said Board, on Wednesday the 14th day of March 1984, together with the certifications, signatures and endorsements thereon.

Resolution No. 04086

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said County at Newark, this 20th day of March A.D. 1984

DANIEL W. GIBSON, JR.
Clerk

(Seal)

Appendix A

RESOLUTION OF THE BOARD OF FREEHOLDERS
COUNTY OF ESSEX

Resolution No. 04086

Proposed by Board of Freeholders

Authority for Resolution N.J.S.A. 40:41

Authority for Action E.C.A.C. 3.11(L)

Subject:

RESOUTION OPPOSING COURT ORDER CONGRESSIONAL RE-DISTRICTING

Whereas, as a result of the most recent U.S. census, a re-districting of the Congressional districts in New Jersey was necessary; and

Whereas, in 1981, a plan was put forth which ultimately was declared unconstitutional because of population deviations among the districts; and

Whereas, while the New Jersey Legislature was attempting to reach agreement on a plan which would have districts equal in population, a special three Judge panel of the U.S. District Court promulagated a plan; and

Whereas this plan would divide Essex County into four separate Congressional Districts only one of which would be contained solely within the boundries of the County; and

Whereas, three of the districts will cross several different counties and contain municipalities which do not have any common interest with the Essex County municipalities; and

Appendix A

Whereas, the community of Belleville will be split between two Congressional Districts thereby causing confusion among the citizens, now, therefore, be it

Resolved, that the Essex County Board of Chosen Freeholders hereby expresses their strong disapproval of this plan and furthermore requests the Legislature appeal this plan to the U.S. Supreme Court.

Approved as to form and legality JOSEPH P. BRENNAN

Record of Board Vote (X = Vote N.V. = Abstention ABS = Absent)

Moved by Freeholder Greco

Seconded by Freeholder Parlavecchio

Freeholder:

Beatty Yes

Cifelli Yes

Clay Abstention

Davis Yes

Giblin Yes

Kay, V. Pres. Yes

Lustbader Abstention

Parlavecchio Yes

Greco, President Yes

Appendix A

It is hereby certified that the foregoing resolution was adopted by roll call vote at a regular meeting of the Board of Chosen Freeholders of the County of Essex, New Jersey, held on March 14, 1984.

JEROME D. GRECO
President